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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals, in conflict with the Sixth, Seventh, Ninth, and Eleventh Circuits, but consistent with the First and D.C. Circuits, correctly refused to give collateral estoppel effect to an acquittal under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts.

2. Alternatively, whether the court of appeals holding that an acquittal may have rested on the jury's *failure* to agree unanimously on the sole disputed element of the offense should be summarily reversed or certiorari granted to resolve the conflict between that decision and those by the Second and Ninth Circuits.

PARTIES TO THE PROCEEDING

The petitioner, defendant-appellant below, is Joseph Hirko. Scott Yeager and Rex Shelby were also defendants-appellants below.

The respondent, plaintiff-appellee below, is the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) is reported at 521 F.3d 367. The opinion of the district court (App. 29a-59a) is reported at 447 F. Supp. 2d 734.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. The order denying rehearing (App. 60a-61a) was entered on April 14, 2008. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides, in pertinent part: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT

Petitioner Joseph Hirko was charged with (among other offenses) twelve counts of money laundering, in violation of 18 U.S.C. § 1957. As the court of appeals correctly acknowledged, the only element of those offenses disputed at trial was whether the funds involved were derived from "unlawful activity" – *i.e.*, whether Hirko committed any of the predicate offenses of securities fraud or wire fraud specified in the indictment. The jury acquitted Hirko of all twelve money-laundering counts.

As this Court explained in *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970), the Double Jeopardy Clause bars the government from attempting to re-litigate "an issue of ultimate fact" that a jury has conclusively resolved in the defendant's favor. Here, because the jury resolved the sole factual dispute in Hirko's favor,

Ashe forecloses the government from attempting to try Hirko on the predicate offenses in a subsequent proceeding.

The court of appeals, however, held that *Ashe* does not bar re-prosecution of the predicates, because those offenses had been separately charged in the first trial and the jury had failed to reach a verdict on those counts. More particularly, the court of appeals held that it must "weigh" the presence of those mistried counts when evaluating whether the jury, in acquitting Hirko on the money-laundering offenses, necessarily decided that Hirko did not commit the predicate offenses. The Fifth Circuit acknowledged that its holding forced it to "part ways" with the majority of circuits, which have squarely held that the presence of hung counts does not affect the collateral estoppel analysis applied to counts on which the jury acquitted.

Alternatively, the court of appeals' opinion could be read to hold that – regardless of whether another count was mistried – a verdict of acquittal may simply mean that the jury was *undecided* about the only element of the offense in dispute. It is elementary, however, that a federal jury may acquit a defendant only if each and every juror agrees that the government has failed to meet its burden. Here, where the only question before the jury was whether Hirko committed any of the predicate offenses, the jury's unanimous verdict of acquittal can mean *only* that every juror concluded that Hirko was not guilty of *any* of the predicate offenses. If the court of appeals in fact concluded that the acquittals might reflect indecision rather than unanimous agreement, that reasoning (which has been rejected by two other courts of appeals) is so patently erroneous as to justify summary reversal.

A. Background

This case arises out of certain statements made by Hirko and others to analysts and to the public in early 2000 concerning a telecommunications network owned by a subsidiary of Enron Corporation ("Enron"). In 1997, Enron acquired Portland General Electric, where Hirko had worked for 17 years. Tr. 10475, 10480. Following the acquisition, Hirko became an executive with the Enron-owned company, later renamed Enron Broadband Services ("EBS"), serving as its President and CEO from approximately July 1999 through July 2000. Tr. 10470. EBS was developing a telecommunications network known as the Enron Intelligent Network ("EIN").

The trial principally concerned allegations that Hirko and his co-defendants, Scott Yeager and Rex Shelby, had misrepresented capabilities of the EIN and certain network-control software, thereby inflating Enron's stock price. According to the government, the defendants thereafter sold shares of Enron stock, profiting from the fraudulently inflated price. The government further alleged that Hirko "laundered" the proceeds of those offenses by transferring the proceeds of his stock sales to other accounts.[1] See App. 39a-41a.

More particularly, the government charged Hirko with seven counts of securities fraud and wire fraud for activities occurring in the first half of 2000. Count 2 charged securities fraud based on alleged misrepresentations at Enron's annual equity analyst conference on January 20, 2000. Counts 3 through 6 charged wire fraud based on alleged mis-

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[1] The indictment also charged Hirko with a variety of other offenses, none of which is at issue in this petition.

representations in EBS press releases issued in January, March, April, and May 2000. Counts 25 and 26 charged two acts of insider trading (a type of securities fraud) based on Hirko's sale of Enron stock in May 2000, at prices the government claimed were inflated by the prior frauds. App. 32a-34a.

The indictment also alleged 12 counts of money laundering based on those fraud counts. The government charged that Hirko transferred the proceeds of his stock sales (which, in turn, were the product of his securities- and wire-fraud offenses) to other accounts. App. 32a-34a. The government claimed that those transfers constituted acts of money laundering, in violation of 18 U.S.C. § 1957.[2] Significantly, the indictment did not tie these offenses – which the parties refer to as the "2000 Money Laundering Counts" – to a particular securities- or wire-fraud count. App. 41a. Accordingly, the jury was free to use *any* of the underlying securities and wire fraud counts as predicates for each of the 2000 Money Laundering Counts.

B. The Trial

1. Hirko's Sole Defense To The 2000 Money Laundering Counts.

Hirko presented a single, well-focused defense to the 2000 Money Laundering Counts: He did not

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[2] Section 1957 makes it unlawful to "knowingly engage[] or attempt[] to engage in a monetary transaction in criminally derived property of a value greater than $10,000 [that] is derived from specified unlawful activity." Unlike money laundering charged under 18 U.S.C. § 1956, Section 1957 does not require the government to prove that the transaction "promoted" a criminal offense; rather, Section 1957 criminalizes the mere movement of the criminally derived funds.

commit the predicate frauds. Hirko's counsel argued that his client "did not lie, misrepresent, hype, or falsely t[ou]t the capabilities of his business." Tr. 511. And Hirko himself took the stand and testified that he "absolutely" believed in the accuracy of EBS's public statements and that his stock trades were not based on any material, nonpublic information. Tr. 10472, 10908, 10942. But Hirko never contested the remaining elements of the money laundering charges – *i.e.*, that he had engaged in monetary transactions, derived from his stock sales, that exceeded $10,000. App. 16a. Indeed, Hirko agreed with the government's characterization that his "total net proceeds for the trades in 2000 that are at issue in this case" were approximately $9.8 million. Tr. 11373. He simply insisted that those proceeds were not "criminally derived" because he was not guilty of any of the predicate offenses charged in the indictment. Tr. 13307.

2. The Jury Was Authorized To Convict Hirko Of Money Laundering If It Found That He Had Committed Any *Of The Predicate Offenses.*

With respect to the 2000 Money Laundering Counts, the jury instructions explained that Hirko was charged with laundering "funds generated through wire fraud and fraud in the sale of securities" (Tr. 13664), and that he should be convicted of money laundering if the jury found five elements:

> First: That the defendant engaged or attempted to engage in a monetary transaction;
>
> Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;
>
> Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in

> violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;
>
> Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and
>
> Fifth: That the transaction took place in the United States.

App. 16a-17a n.17.

The jury instructions also made clear that the jury need not find that Hirko had committed both wire fraud *and* securities fraud to sustain a conviction for money laundering. On the contrary, all that was necessary was that the jury find that the defendant knowingly possessed proceeds of "some" offense, which could be either wire fraud or securities fraud or both:

> The Government must prove that the Defendant knew that the property involved in the monetary transaction constituted or was derived from proceeds obtained by *some* criminal offense. The Government does not have to prove that the Defendant knew the precise nature of that criminal offense or knew the property involved in the transaction represented the proceeds of *wire fraud or fraud in the sale of securities.*

Tr. 13670 (emphases added).

The jury instructions also expressly defined "criminally derived property" as "any property constituting or derived from the proceeds of *a* criminal offense." Tr. 13670 (emphasis added). They also made clear that, "[a]lthough the Government must prove that, of the property at issue, more than $10,000 was

criminally derived, the Government does not have to prove that all of the property at issue was criminally derived." Tr. 13670-71. In addition, the jury was instructed: "When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account." Tr. 13671. Thus, the jury was instructed to convict Hirko of the 2000 Money Laundering Counts if it found that Hirko had committed *any* of the predicate frauds.

3. The Jury's Deliberations And Partial Verdict.

During the fourth day of deliberations, the jury indicated it had reached agreement on certain counts but was deadlocked on others. Tr. 13711. At 3:50 p.m., the district court sent the jury back, but directed it to take only "until the end of the day" – *i.e.*, "until 5:00 [p.m.]" – to decide whether additional deliberations could be helpful. Tr. 13724. After the prescribed 70 minutes had elapsed, the jury indicated that it had not yet made additional progress. The court decided to "take their verdict" instead of asking the jury to return for a fifth day of deliberations. Tr. 13725. The jury then returned verdicts of acquittal on 14 of the counts against Hirko, including all of the 2000 Money Laundering Counts (Counts 55 through 66) and the insider trading counts for stock sales on February 18, 2000, and April 20, 2000 (Counts 23 and 24). App. 31a. The jury did not reach a verdict on the remaining counts, which were mistried. Tr. 13727-28.[3]

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[3] Hirko's co-defendants fared similarly: The jury acquitted Yeager of conspiracy, wire fraud, and securities fraud; it acquitted Shelby of some insider trading counts. The

C. The Superseding Indictment And Motion To Dismiss

The government then filed a superseding indictment, which proposed to retry several of the predicate offenses that underlay the 2000 Money Laundering Counts on which the jury had acquitted. In addition to several offenses not relevant here, the superseding indictment charged Hirko with several of the same acts of securities fraud and wire fraud that formed the predicate offenses for the 2000 Money Laundering Counts.

Hirko moved to dismiss those counts (numbered 2-6 in the superseding indictment). Hirko's motion argued that, because the only element of the 2000 Money Laundering Counts in dispute at the first trial was whether Hirko had committed the predicate offenses, and because the jury had unanimously acquitted him of all 12 of the 2000 Money Laundering Counts, the jury necessarily had concluded that Hirko did not commit the predicate offenses. Accordingly, Hirko explained, *Ashe* prohibited the government from attempting to re-litigate the predicate offenses by separately charging them in a superseding indictment.

The district court denied the motion.[4] It acknowledged that *Ashe* precludes the government from attempting to relitigate in a subsequent proceeding "'the facts necessarily determined in the

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remaining counts against those defendants were likewise mistried. Notably, the jury did not convict Hirko, Yeager, or Shelby of *any* of the 176 total counts brought to trial (in various combinations) against these defendants.

[4] The district court rejected similar motions filed by Yeager and Shelby. See App. 3a. Hirko's retrial is currently scheduled to commence on November 3, 2008.

former trial.'" App. 36a (quoting *United States* v. *Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997)). And it did not dispute that Hirko's only defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. The district court nevertheless denied the motion on grounds on which the court of appeals refused to rely, which the government refused to defend on appeal, and which therefore do not merit further discussion.

D. The Fifth Circuit's Decision

Hirko appealed,[5] arguing that *Ashe* foreclosed the government's second attempt to prove that Hirko had committed the predicate offenses upon which the 2000 Money Laundering Counts were based. Hirko again noted that his sole defense to those charges was that he did not commit the predicate offenses and argued that, in acquitting him of the 2000 Money Laundering Counts, the jury necessarily resolved that fact in his favor. C.A. Br. 15-18, 30-39. Hirko further explained that the jury's failure to reach a verdict on other counts in the indictment – including the separately charged predicate offenses – should not affect the collateral estoppel analysis. *Id.* at 48-54. Hirko specifically directed the court of appeals to several decisions from other circuits holding that the presence of mistried counts does not alter the collateral estoppel effect of a verdict of acquittal. *Id.* at 48-49.

The government did not dispute that Hirko's sole defense to the 2000 Money Laundering Counts was that he had not committed the predicate fraud

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[5] Because the motion to dismiss was based on double jeopardy grounds, its denial was immediately appealable under 28 U.S.C. § 1291 and the collateral order doctrine. See *Abney* v. *United States*, 431 U.S. 651, 662 (1977).

offenses. Instead, the government's principal argument was that *Ashe never* applies when a jury has failed to reach a verdict on counts that are factually related to the acquitted counts. The government reasoned that, because *Richardson* v. *United States*, 468 U.S. 317, 324 (1984), held that declaration of a mistrial does not automatically bar the government from retrying its case, declaration of a mistrial precludes any examination into the collateral estoppel consequences of an acquittal that is coupled with one or more hung counts. The government also pointed to *United States* v. *Powell*, 469 U.S. 57 (1984), which held that courts should not attempt to reconcile inconsistencies between unanimous verdicts of conviction and acquittal. In the government's view, it followed from *Powell* that a court must ignore the collateral estoppel consequences of an acquittal where the jury *fails* to reach a verdict on another count.

The Fifth Circuit affirmed the denial of Hirko's motion to dismiss.[6] The court of appeals recognized that, "[a]fter an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge 'if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution.'" App. 6a (quoting *Brackett*, 113 F.3d at 1398). And with respect to Hirko, the panel expressly acknowledged that Hirko's sole defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. App. 16a. Indeed, the court of appeals observed that Hirko had "stipulated to the other elements" of money laundering, other than the commission of the predicate acts. App. 17a.

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[6] The court of appeals likewise affirmed the denials of Yeager's and Shelby's motions. App. 3a.

Nevertheless, the court of appeals rejected Hirko's collateral estoppel argument. In so doing, the panel relied on the fact that the jury had failed to reach a verdict on the separately charged predicate offenses and speculated that the acquittals on the 2000 Money Laundering Counts might therefore have been based on mere indecision about whether Hirko had committed the predicate offenses. As the panel explained:

> In addition to money laundering, Hirko was also charged with securities fraud, wire fraud, and insider trading, and the jury hung on these counts. Since it could not determine whether Hirko committed these acts, the jury then could not convict Hirko on the Money Laundering Counts and had to acquit.

App. 18a. Put another way, the court of appeals concluded that, because the jury had hung on the separately charged counts, it did not "necessarily" find that Hirko had not committed the predicate offenses when acquitting him of money laundering. Rather, the panel surmised, the jury's unanimous decision to acquit Hirko of the 2000 Money Laundering Counts might have reflected mere *indecision* about the sole disputed element, not a unanimous finding that the government had failed to prove it. App. 17a-18a.

When discussing a similar challenge brought by one of Hirko's co-defendants, the court of appeals explained at length why it thought it was legally appropriate to rely on the presence of hung counts in applying the collateral estoppel principles set forth in *Ashe*. The court held that its decision in *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), withdrawn in part on other grounds, 611 F.2d 585 (5th Cir. 1980), "requires that we consider mistried counts in our

collateral estoppel analysis." App. 23a. "[T]he presence of mistried counts," the court of appeals continued, "diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial." *Ibid.*

The court of appeals declined (at least formally) to embrace the government's sweeping assertion that *Ashe* never applies to any count on which a jury has failed to reach a verdict. In particular, the court of appeals rejected the notion that *Powell* – which bars attempting to reconcile inconsistent *verdicts* (*i.e.*, acquittal and guilty) within the *same proceeding* – categorically "preclude[s] applying collateral estoppel where a jury acquitted defendants on some counts but hung on related counts." App. 26a. The court of appeals agreed with numerous other circuits that have rejected that precise argument. App. 26a (citing *United States* v. *Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007); *United States* v. *Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States* v. *Frazier*, 880 F.2d 878, 883 (6th Cir. 1989)). "[W]e concur with our sister circuits," the court of appeals explained, "that it is impossible to discern definitively why a jury hung." App. 27a.

The court of appeals expressly acknowledged, however, that its willingness even to *consider* the presence of hung counts when examining the collateral estoppel consequences of an acquittal directly conflicted with other courts of appeals: "Where we part ways with our sister circuits is that they ignored the mistried counts after they determined that *Powell* does not apply. Because our precedent dictates that we weigh mistried counts, however, we cannot do the same." App. 27a; see also *id.* n.22 ("We can only

speculate as to why our sister circuits did not also consider the mistried counts in [their] analysis under *Ashe*. While our precedent requires us to weigh mistried counts in determining whether collateral estoppel applies under the *Ashe* framework, the other circuits may not be similarly bound by their precedent.").

Hirko timely filed a petition for rehearing *en banc*, which was denied without comment. App. 60a-61a.

REASONS FOR GRANTING THE PETITION

In *Ashe* v. *Swenson*, 397 U.S. 436, 445 (1970), this Court made clear that principles of collateral estoppel are "embodied in the Fifth Amendment guarantee against double jeopardy." Consequently, when a jury has resolved "an issue of ultimate fact" in favor of a defendant, the government cannot then re-litigate that issue in a subsequent criminal proceeding. *Id.* at 443. In application, that "requires a court to examine the record of a prior proceeding" in order to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.* at 444 (citation and internal quotation marks omitted).

The facts at issue in *Ashe* perfectly illustrate the wisdom of that rule. The defendant there was charged with armed robbery of one of six participants in a poker game. *Id.* at 438. At trial, "[t]he single rationally conceivable issue in dispute before the jury" was whether the defendant had been properly identified as present at the scene. *Id.* at 445. The jury returned a verdict of acquittal, after which prosecutors tried the defendant for the armed robbery of a different participant at the same poker game. *Id.* at 439. This Court held that the "[s]traightforward application" of

collateral estoppel principles prohibited the second prosecution because the first jury had determined that the defendant was not present when the robbery took place. *Id.* at 445.

Here, as in *Ashe*, Hirko presented a single defense to the 2000 Money Laundering Counts: He did not commit the predicate offenses upon which they were premised. The court of appeals expressly acknowledged as much, yet it refused to recognize the logical import of the jury's verdicts of acquittal. Instead, it held that the government was free to re-try Hirko for the very same predicate offenses. The evident basis for its holding was that the same jury had failed to reach a verdict on the separately charged predicate offenses.

The Fifth Circuit's willingness to "weigh" the presence of hung counts when determining whether a verdict of acquittal precludes re-litigation of the sole disputed element furthers an already deep conflict among the lower courts. The majority of circuits to have considered the question have specifically held that hung counts are irrelevant as a matter of law to the collateral estoppel analysis. The Fifth Circuit recognized that fact, explaining that its analysis forced it to "part ways with [its] sister circuits." App. 27a. This Court's review is necessary to resolve that persistent conflict on a question the government has acknowledged to be of "exceptional importance." See p. 24, *infra*.

Review is also warranted to remedy the serious defects inherent in the Fifth Circuit's rule. As a practical matter, permitting courts to consider hung counts renders the protections of collateral estoppel unavailable in partial verdict cases. If a hung count is "relevant" at all, it necessarily introduces uncertainty

as to the meaning of an acquittal and thereby suspends application of *Ashe*. Relying on hung counts also violates the long-settled understanding – confirmed in *Richardson* v. *United States*, 468 U.S. 317 (1984), and *United States* v. *Powell*, 469 U.S. 57 (1984) – that a jury's failure to reach a verdict is, for purposes of the Double Jeopardy Clause, a "non-event."

There is another way to interpret the Fifth Circuit's opinion, but that reading renders the decision so patently erroneous as to warrant summary reversal. Arguably, the Fifth Circuit denied Hirko's appeal without regard to the presence of hung counts because, in its view, the jury's acquittal on the 2000 Money Laundering Counts might have been based on mere *indecision* as to whether Hirko committed the predicate offenses. App. 18a. Such a rule – specifically, that a jury may acquit a defendant because it *cannot agree* whether the defendant is guilty of the sole disputed element – violates even the most basic understanding of a jury's function (not to mention the actual instructions the jury here received). If a jury cannot agree on a disputed element, it must *hang*; conversely, a verdict of *acquittal* can mean only that the jury has unanimously resolved that element in the defendant's favor. To our knowledge, no federal court – other than the panel in this case – has ever held otherwise, and at least two Circuits have expressly repudiated the rationale invoked by the panel. If the court below in fact acted on that legally untenable premise, its decision should be summarily reversed.

I. The Decision Below Deepens A Conflict Among The Lower Courts And Erroneously Permits The Government To Relitigate Questions A Jury Has Unanimously Determined In A Defendant's Favor.

A. The Fifth Circuit's Decision Squarely Conflicts With Those From Several Other Circuits And One State High Court.

This Court should grant review to resolve the deep split among the lower courts over the application of *Ashe* to partial verdicts of acquittal – *i.e.*, verdicts where a jury acquits on some counts and hangs on others. Four federal courts of appeals and one state high court have specifically held that the presence of mistried counts does not affect the collateral estoppel consequences of a jury's verdict of acquittal. The Fifth Circuit, however, concluded that courts must "weigh" the mistried counts to determine whether they limit the collateral estoppel consequences of an acquittal. App. 27a-28a. In so holding, the Fifth Circuit expressly "part[ed] ways with" the majority rule and adopted the minority position followed by only two other circuits.

1. The Sixth, Seventh, Ninth, and Eleventh Circuits – plus the Court of Appeals of Maryland – have specifically held that the presence of mistried counts is irrelevant to the collateral estoppel effect afforded to a verdict of acquittal. In *United States* v. *Ohayon*, 483 F.3d 1281, 1282 (11th Cir. 2007), the defendant was charged with "conspiracy to possess with intent to distribute and attempt to possess with intent to distribute * * * ecstasy." Ohayon's sole defense "was that he was unaware of the contents of the bags" that were in his possession when he was arrested. *Ibid.* The jury "acquitted Ohayon of the

attempt count but was unable to reach a unanimous verdict on the conspiracy count." *Ibid.* The government then sought to retry Ohayon on the conspiracy charge, and he moved to dismiss that count under *Ashe*. The district court granted the motion, concluding that the jury's acquittal reflected its unanimous conclusion that Ohayon was not aware of the bags' contents and that such knowledge was an essential component of the government's conspiracy allegation.

The Eleventh Circuit affirmed. Recognizing that "the application of collateral estoppel to a partial verdict * * * is an issue that has divided not only our sister circuits but panels of our circuit as well," *ibid.*, the court flatly rejected the government's claim that the mistried count cast doubt on the basis of the jury's verdict of acquittal. The court explained that

> the failure of a jury to reach a verdict is not a decision; *it is a failure to reach a decision.* A partial verdict does not comprise two decisions that we must try to reconcile, because *the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis.* The very essence of a mistried count is that the jury failed to reach agreement.

Id. at 1289 (emphasis added).[7]

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[7] Notably, the Eleventh Circuit held that this conclusion was compelled by *United States* v. *Larkin*, 605 F.2d 1360 (5th Cir. 1979), upon which the Fifth Circuit here relied to reach precisely the opposite result. Compare 483 F.3d at 1289 ("*Larkin* settles the issue") with App. 23a ("*Larkin* requires that we consider mistried counts in our collateral estoppel analysis").

Likewise, in *United States* v. *Romeo*, 114 F.3d 141, 142 (9th Cir. 1997), the defendant presented a single defense to a two-count indictment charging importation of marijuana and possession with intent to distribute. "The only contested element, and the only contested issue argued to the jury, was * * * whether or not [Romeo] knew that there was marijuana in the car" that he was driving when arrested. *Ibid.* The jury acquitted Romeo of the possession charge but hung (11-1 in favor of acquittal) on the importation count. *Ibid.* Romeo moved for a verdict of acquittal on the importation count, arguing that *Ashe* barred retrial. *Ibid.* The district court denied the motion, but the Ninth Circuit reversed. The court of appeals refused to rely on the presence of the hung count to diminish the collateral estoppel consequences that followed from the jury's unanimous verdict of acquittal on the possession count: "Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, *not on why the jury could not agree on the deadlocked count*." *Id.* at 144 (emphasis added).

The Sixth Circuit also follows this rule. In *United States* v. *Frazier*, 880 F.2d 878, 883 (6th Cir. 1989), the court explained that "[n]o * * * inconsistency is necessarily present * * * when a jury acquits on some charges and fails to agree on others. Both the acquittal and the failure to agree could result from a number of factors, none of which makes the verdict inconsistent or the jury's actions irrational." Accordingly, it held that *Ashe* precluded retrial of a count of making false entries in bank records (on which the jury had hung), where the jury had acquitted the defendant of

misapplication of funds and the sole defense to both charges was that the defendant lacked intent to defraud. *Id.* at 885-886.

The Seventh Circuit likewise has adopted the majority rule, although it cast its rule as a question of "direct" rather than "collateral" estoppel: "In a retrial of a mistried count in a multicount indictment, does direct estoppel bar the government from relitigating issues that were necessarily and finally decided in the defendant's favor by reason of the jury's partial acquittal on other counts? We hold that it does." *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); see also *id.* at 280 ("[T]he 'jury's failure to reach a verdict [is] too inconclusive to qualify as inconsistent' for the purposes of issue preclusion.") (quoting Anne B. Poulin, *Collateral Estoppel in Criminal Cases*, 58 CINN. L. REV. 1, 44 n.12 (1989)). And at least one state high court also has held that the federal Constitution precludes the government from relying on mistried counts to evade the collateral estoppel consequences of an acquittal. See *Ferrell* v. *State*, 567 A.2d 937, 944 (Md. 1990) ("There is no question that those verdicts [of acquittal] do constitute a valid determination of issues of ultimate fact. Because the jury's failure to agree [on other counts] did not decide any facts, it did not make the validity of that determination questionable.").

2. In stark contrast, three circuits hold that a court must consider the presence of hung counts when evaluating the collateral estoppel consequences afforded to an acquittal under *Ashe*. In the decision below, the Fifth Circuit held that it must "weigh" the mistried counts, expressly acknowledging that its holding forced it to "part ways with [its] sister circuits." App. 23a, 27a. The court of appeals conceded that the

only disputed fact with respect to the 2000 Money Laundering Counts was whether Hirko had committed the predicate offenses. App. 16a ("At trial, Hirko stipulated to having engaged knowingly in monetary transactions involving more than $10,000. Both parties also acknowledged that the bulk of the funds involved in the transactions underlying the [2000] Money Laundering Counts came from Hirko's sale of Enron stock in 2000."). Nor did the court of appeals dispute that the jury was authorized to convict Hirko of the 2000 Money Laundering Counts if it determined that he had committed *any* of the predicate offenses. Relying on the hung counts, however, the court of appeals held that the jury's unanimous acquittal on all 12 of the 2000 Money Laundering Counts did not preclude the government from retrying Hirko on the predicate offenses.

The effect of the hung counts on the Fifth Circuit's analysis cannot be overstated. The court relied on the hung counts to conclude that the acquittals on the 2000 Money Laundering Counts might simply have reflected the jury's failure to agree as to the lone disputed element of those charges. As we explain below (pp. 28-31, *infra*), the proposition that a jury can acquit (rather than hang) if it is simply undecided about an element is manifestly erroneous. Thus, the Fifth Circuit's effort to account for the presence of the hung counts did not just shade its analysis of the acquittals, it led it to elide the crucial distinction between an acquittal and a hung jury.

The D.C. Circuit also follows the minority rule embraced by the court below. In *United States* v. *White*, 936 F.2d 1326, 1327 (D.C. Cir. 1991), the defendant was charged with possession of "an unlawfully issued birth certificate with the intent to

defraud the United States" and making false statements in support of a passport application. "At trial, * * * the defendant did not deny committing the acts charged," disputing only whether he had knowledge of the applicant's true identity and therefore formed the fraudulent intent necessary to commit both offenses. *Id.* at 1328. The jury acquitted the defendant of the possession count but hung on the false-statement count. The government then obtained a superseding indictment re-charging the false-statement count and charging additional (factually overlapping) offenses. The defendant unsuccessfully moved to dismiss those counts under *Ashe*.

The D.C. Circuit affirmed. The court refused to "read the implications of the appellant's acquittal" on the possession charge to preclude retrial, expressly relying on the fact that the jury had hung on the false-statement count:

> The finding that the defendant believed Linden to be Baldwin would have extended to and controlled the verdict on the second count and the jury would have found that the defendant did not wilfully make a false statement in the passport application. Since the jury reached no verdict on the passport count, it must have based the Count I acquittal on a finding other than that which the appellant urges.

Id. at 1329.

The First Circuit also appears to have adopted the minority rule. In *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 21 (1st Cir. 1992), the defendant was charged with one count of importation of cocaine and one count of possession with intent to distribute. At trial, the government's sole theory of guilt on both charges was that the defendant knew the packages in

question contained drugs when she retrieved them from the Post Office. *Id.* at 24. The jury acquitted the defendant on the importation count but hung on the possession count. The defendant moved to dismiss the possession count under *Ashe*, arguing that the jury necessarily concluded that she did not know the packages contained drugs. The district court denied the motion.

The First Circuit affirmed, concluding that the "[f]irst and foremost" "flaw[] in defendant's arguments" was that the presence of the hung count belied the notion that the jury had necessarily concluded the defendant was unaware of the package's contents. *Ibid.* "[I]f the jury acquitted the defendant on count two [importation] based on a determination that she had no knowledge as to the contents of the packages," the court explained, "it seems to us that an acquittal as to count one [possession] would have necessarily followed since knowledge as to the contents of the packages is an element of the offense of possession with intent to distribute." *Ibid.*

3. As explained above, the majority of circuits to have specifically addressed the question (plus at least one state high court) have held that hung counts are not relevant to the collateral estoppel analysis prescribed by *Ashe*. But the weight of opinion is even more strongly against the minority position adopted below. That is because there is no meaningful difference between holding that hung counts must be "weighed" in the collateral estoppel analysis and a *de facto* rule that collateral estoppel is categorically inapplicable to partial verdicts. If the hung count is relevant *at all*, it will *necessarily* create uncertainty regarding the basis for the verdict of acquittal. Any time a jury returns a partial verdict, the government

will be able to claim (as it did here) that, because the jury failed to reach a verdict on the factually overlapping hung count, the jury must have based its acquittal on something other than the rationale that would preclude further prosecution.

Properly understood, then, the Fifth Circuit's rule is tantamount to holding that *Ashe* is a dead letter in partial verdict cases. In addition to those courts that have specifically held that hung counts are irrelevant to the collateral estoppel analysis, at least two more courts have rejected a categorical ban on applying *Ashe* to partial verdicts. See *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979); *United States* v. *Felder*, 548 A.2d 57, 66 (D.C. 1988) ("[T]he fact that the original determination was in a multi-count indictment, part of which remains unresolved by the jury, is no *per se* bar to application of collateral estoppel."). Thus, among the increasingly large number of courts that have considered the application of *Ashe* to partial verdict cases, the Fifth Circuit is among the small minority that permit the government to evade the collateral estoppel consequences of an acquittal.

4. Finally, there can be no doubt regarding the existence and importance of this conflict, because the United States has recently acknowledged as much. Just last year, the United States urged the Eleventh Circuit to grant *en banc* review of the panel's opinion in *Ohayon*, arguing that the D.C. Circuit's decision in *White* and the First Circuit's decision in *Aguilar-Aranceta* correctly considered hung counts when applying *Ashe* to a partial verdict. See U.S. Pet. for Reh'g and Reh'g En Banc at 12, *United States* v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007) (No. 05-17045). It is not surprising, then, that the government never

challenged the panel's statement that this question has divided the circuits, 483 F.3d at 1290.

What is more, the government recognized that this issue is one of "exceptional importance." *Ohayon* Reh'g Pet. at i. On that point we are in complete agreement: Whether the presence of hung counts should affect – or, as the government would have it, eviscerate – the application of *Ashe* is a question of tremendous significance. Juries reach partial verdicts on a virtually daily basis, and, as the cases described above illustrate, the issue has arisen with some frequency in recent years.

Moreover, as this Court and many commentators have recognized, the collateral estoppel principles set forth in *Ashe* (and recognized at least since Justice Holmes' opinion in *United States* v. *Oppenheimer*, 242 U.S. 85 (1916)), provide an essential complement to the traditional double jeopardy framework under *Blockburger* v. *United States*, 284 U.S. 299 (1932). See, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 705 (1993) (rejecting argument that government must bring prosecutions for the "same conduct" simultaneously, in part because *Ashe* protects against relitigation "where the Government has *lost* an earlier prosecution involving the same facts"); Anne Bowen Poulin, *Double Jeopardy Protection From Successive Prosecution: A Proposed Approach*, 92 GEO. L.J. 1183, 1214 (2004) ("[*Blockburger*] is too easily circumvented in the modern era of numerous duplicative offenses.").

B. The Decision Below Is Wrong.

This Court's review is also necessary to remedy the serious defects inherent in the Fifth Circuit's rule. The decision below thoroughly dilutes the protections of the Double Jeopardy Clause and (perversely) *rewards* the

government for *failing* in its first attempt to prove its case.

1. As explained above (pp. 22-23, *supra*), "weighing" the presence of hung counts is no different from categorically foreclosing the application of *Ashe* to partial verdicts. This case illustrates that fact all too well. As the Fifth Circuit expressly acknowledged, Hirko presented a *single* defense to a *single* element of the 2000 Money Laundering Counts: He did not commit *any* of the underlying predicate offenses. The jury unanimously agreed, acquitting him of all 12 of those counts.

Under the Fifth Circuit's rule, however, that determination does nothing to bar the government from relitigating the predicate offenses. The decision below establishes, in effect, an irrebutable presumption that a hung count cannot be reconciled with the otherwise uncontested import of a jury's acquittal. Indeed, the enormous "weight" of the hung counts at issue here led the Fifth Circuit to speculate that the jury acquitted Hirko of the 2000 Money Laundering Counts because it *could not decide* whether Hirko committed the predicate offenses – *i.e.*, that the jury violated its instructions by rendering a verdict that was not unanimous. Tr. 13673, 13676. It is well settled, however, that "a jury is presumed * * * to follow its instructions." *Weeks* v. *Angelone*, 528 U.S. 225, 226 (2000) (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)). Worse still, the decision below violates that maxim selectively: It presumes that the jury followed its instructions to the letter when deliberating on the hung counts, but that it must have acted irrationally or mistakenly *only* with respect to the counts on which it unanimously acquitted.

2. The Fifth Circuit's rule also has the perverse effect of rewarding the government for bringing additional counts but failing to prove them. Here, had the original indictment charged Hirko only with the 2000 Money Laundering Counts – *i.e.*, had it not separately charged the predicate offenses – there would be no question that the jury's acquittal on those counts would preclude the government from attempting to prove a second time that he committed those offenses. See *United States* v. *Powell*, 469 U.S. 57, 64 (1984). But because the government larded the indictment with multiple offenses based on the same conduct and then *failed* to convince the jury to convict on some of them, it is relieved of the consequences of a jury's *acquittal* on related offenses.

That makes no sense. If prosecutors are rewarded for securing a mistrial on perhaps just one factually overlapping count, they will have strong incentives to heap multiple factually overlapping counts into an indictment. That is because, if the jury acquits the defendant on all charges, the government is no worse off than if it had exercised sound prosecutorial discretion and brought only those charges truly necessary to vindicate the government's interests. But if the jury hangs on even a single factually overlapping count, the government is entitled to retry that charge even if the jury has acquitted the defendant of the very same conduct on other counts. The Fifth Circuit's rule thus encourages prosecutors to overcharge a case, turning the protective function of the Double Jeopardy Clause on its head.

Relying on a hung count to limit the reach of the Double Jeopardy Clause based on a mistried count is particularly odd because a hung jury is generally a "non-event" for double jeopardy purposes. Just as a

defendant cannot rely on the jury's failure to reach a verdict to preclude retrial, see *Richardson* v. *United States*, 468 U.S. 317 (1984), the government cannot rely on the same to preclude the double jeopardy consequences of an acquittal. See *Ohayon*, 483 F.3d at 1289 ("the failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision").

It is puzzling, then, that the government has claimed that *Richardson* supports its bid to retry Hirko for these crimes. See Gov't C.A. Br. at 23-24. If that decision sheds any light on the question presented here, it confirms that hung counts do not have double jeopardy consequences the way *actual verdicts* do. For the same reason, the government's reliance on *Powell* is entirely misplaced. *Powell* held that mixed *verdicts* of convictions and acquittals that appear inconsistent do not entitle the defendant to a retrial on the counts of conviction because "it is unclear whose ox has been gored." *Id.* at 65. The Fifth Circuit's rule, however, would eliminate the double jeopardy consequences of a *verdict* of acquittal based merely on the jury's *failure to decide* another count. And if the government successfully circumnavigates the (flexible) *Blockburger* test, it can also bring *new* charges based on the same factual allegations that a jury already has resolved in favor the defendant – effectively upending the verdict of acquittal on the basis of a mistried count.

Indeed, this is an especially inappropriate case in which to attempt to discern meaning from the jury's failure to reach a verdict on certain counts. When the jury indicated it was deadlocked on only the fourth day of deliberations, the district court gave an *Allen* charge, but with a peculiar twist: Shortly before the jury's usual 4:00 p.m. quitting time, the district court asked the jury to deliberate only "until 5:00 [p.m.]" on

that day – an unusual step, given that it takes time for a proper *Allen* charge to work. See *Lowenfield* v. *Phelps*, 484 U.S. 231, 240 (1988) (verdict that closely follows an *Allen* charge "suggests the possibility of coercion"). By telling the jury, in effect, that it could avoid additional days of service simply by waiting out the clock for another 70 minutes, the charge likely entrenched, not dissipated, the deadlock. That the jury did not push through to additional acquittals during those final minutes of the fourth day of deliberations provides no basis to reject the preclusive effect of the acquitted counts.

II. Alternatively, If One Reads The Court Of Appeals' Opinion Not To Rely Directly On The Presence Of Mistried Counts, The Decision Is So Patently Erroneous As To Warrant Summary Reversal.

The most reasonable reading of the Fifth Circuit's opinion is that it treated the presence of mistried counts as a basis for disregarding the evident meaning of the verdicts of acquittal. But the court of appeals also made the following cryptic statement in attempting to explain its rationale: "if the jury could not decide whether Hirko committed 'a specified unlawful activity,' then it would have to acquit him on the [2000] Money Laundering Counts." App. 18a. This remark – to which the panel adhered even after our rehearing petition called attention to its palpable error – suggests that the court may have disposed of Hirko's case *without regard* to the presence of mistried counts. If the court of appeals indeed concluded that a jury may acquit a defendant where it is simply *undecided* about a particular element of the offense, then that

reasoning is so patently erroneous as to warrant summary reversal.

It is well settled that when a jury fails to resolve an element of an offense – but is otherwise convinced by the sufficiency of the government's proof – the jury must hang, not acquit, on the offense. See Fed. R. Crim. P. 31(b)(3) ("If the jury cannot agree on a verdict on one or more counts, the court may declare a *mistrial* on those counts.") (emphasis added). Tellingly, the Fifth Circuit offered no authority – because none exists – to support its novel contrary assertion. Nor did the court even attempt to confront (much less explain away) the fact that the jury here was properly instructed that its verdict must be *unanimous* on every element of each offense. Tr. 13673, 13676.

At least two circuit courts have expressly repudiated the proposition on which the panel relied. In *United States* v. *Gotti*, 451 F.3d 133 (2d Cir. 2006), the defendant was charged with participation in a RICO enterprise, which required the government to prove that he had committed "'at least two acts of racketeering activity.'" *Id.* at 135 (quoting 18 U.S.C. § 1961(5)). The jury found that the government had "not proved" one predicate offense and that it was undecided as to the remainder. After the district court declared a mistrial, the defendant moved for a verdict of acquittal. He argued that "because the government failed to prove two predicate racketeering acts, he was entitled to acquittal on the RICO charges and the government was therefore barred from retrying him on those charges." 451 F.3d at 135-136. The district court denied the motion, and the Second Circuit likewise "reject[ed] Gotti's extraordinary argument." *Id.* at 136. "Assuming the other elements of the RICO charge were proved to the jury's satisfaction," the court held, "lack

of unanimity as to two predicate acts results in a *hung jury* and a mistrial, not a judgment of *acquittal*." *Id.* at 137 (emphasis added).

Similarly, in *Hoyle* v. *Ada County*, 501 F.3d 1053, 1055 (9th Cir. 2007), the defendant was charged with a compound racketeering offense requiring proof of predicate offenses. The jury found that the government had not proved a number of the predicate offenses, but it specifically indicated that it had failed to reach agreement as to seven of them. *Id.* at 1057. The trial court denied the defendant's motion for judgment of acquittal, concluding that the jury's failure to agree on those predicate offenses meant that it "had not returned a verdict on the entirety of [the count]." *Ibid.* The Ninth Circuit affirmed the denial of federal habeas relief. "Because the jury excepted from its verdict the seven predicate acts on which it could not agree," the court explained, "the trial court correctly refused to acquit * * * because the verdict was not 'a resolution . . . [of] all of the factual elements of the offense charged.'" *Id.* at 1065 (quoting *Smith* v. *Massachusetts*, 543 U.S. 462, 468 (2005) (alterations in original)).

The suggestion that Hirko's jury acquitted on the 2000 Money Laundering Counts because it may have been undecided about the predicate offenses is flatly contrary to those decisions. Moreover, as the government itself argued in *Gotti*, the notion that a jury's failure to agree is the same thing as failure to prove the predicate offense is "nonsensical"; "a defendant cannot be acquitted unless all the jurors agree on the Government's failure to prove his guilt." U.S. Br. at 6, *United States* v. *Gotti*, 451 F.3d 133 (2d Cir. 2006) (No. 05-6872). It follows that a verdict of

acquittal can rest only on jurors' unanimous resolution of the disputed element in the defendant's favor.

Logical defects aside, the Fifth Circuit's contrary ruling would work considerable mischief if left standing. When, in future cases, juries deadlock on one or more elements of an offense, defendants will be entitled to demand a directed verdict of acquittal. They will argue (citing the published decision at issue here) that a jury's failure to decide constitutes an acquittal. To our knowledge, no other court has ever adopted so surprising a proposition. Yet that is the unavoidable implication of the apparent assertion that a jury that "could not decide" an element of money laundering "would have to acquit" the defendant of that charge. App. 18a.

In our view, the more sensible reading of the Fifth Circuit's opinion is that it relies on the presence of hung counts to evaluate the collateral estoppel consequences of a verdict of acquittal. If, however, the Court were to read the decision below to have rejected Hirko's claim *without regard* to the presence of hung counts – *i.e.*, to have concluded that the jury's acquittals on the 2000 Money Laundering Counts might have rested on mere indecision with respect to the sole disputed element – summary reversal is warranted to correct such an unprecedented and egregious error. Alternatively, this Court should grant certiorari to resolve the stark conflict between such reasoning and the decisions in *Gotti* and *Hoyle*.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented. Alternatively, the court should summarily reverse the Fifth Circuit's judgment or grant certiorari on the second question presented.

Respectfully submitted.

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JULY 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[FILED:
March 17, 2008]

No. 06-20321

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SCOTT YEAGER

Defendant - Appellant

Consolidated with
No. 06-20593

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

REX SHELBY

[redacted]

Defendant - Appellant

Consolidated with
No. 06-20691

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JOSEPH HIRKO

Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Texas

Before HIGGINBOTHAM, GARZA, and BENAVIDES, Circuit Judges.

FORTUNATO P. BENAVIDES, Circuit Judge:

This is a consolidated interlocutory appeal of an order denying a motion to dismiss a government indictment under the doctrine of collateral estoppel.[1] In

[1] We have jurisdiction over this case under 28 U.S.C. § 1291. Abney v. United States, 431 U.S. 651, 659 (1977) ("Although it is true that a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds lacks the finality traditionally considered indispensable to appellate review, we

2005, Defendants F. Scott Yeager, Joseph Hirko, and Rex Shelby ("Defendants") were tried on various counts for their actions while employed at Enron Broadband Services ("EBS"). The jury acquitted Defendants on some of these counts but hung on others, after which the United States ("Government") again indicted Defendants on some of the mistried counts. Contending that the acquitted counts collaterally estopped the Government from pursuing the mistried counts, Defendants moved to dismiss the indictment. The district court denied the motion. For the reasons below, we AFFIRM.

I.

This case arises from the collapse of Enron Corporation ("Enron") and its subsidiaries. Defendants were senior executives at EBS, Enron's broadband and telecommunications unit. In November 2004, Defendants were indicted on various counts of: (1) conspiracy to commit securities and wire fraud, (2) securities fraud; (3) wire fraud, (4) insider trading, and (5) money laundering.[2]

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conclude that such orders fall within the small class of cases that Cohen [sic] placed beyond the confines of the final-judgment rule.") (internal quotation marks omitted).

[2] Defendants Yeager, Hirko, and Shelby were all charged with one count of conspiracy to commit securities and wire fraud, 18 U.S.C. § 371, one count of securities fraud, 15 U.S.C. §§ 78j(b) and 78ff, and four counts of wire fraud, 18 U.S.C. § 1343. In addition, Yeager was charged with 20 counts of insider trading and 99 counts of money laundering. Shelby was charged with eight counts of insider trading and six counts of money laundering. Hirko was charged with 7 counts of insider trading and 14 counts of money laundering.

In 1998, Enron began developing an "intelligent" telecommunications network and associated software. The indictment alleged that Defendants purposely sought to deceive the public by making false statements about EBS's progress and financial condition. According to the indictment, Defendants made false claims in various press releases beginning in 1999 and at Enron's annual analyst conference in January 2000. The indictment also charged Defendants with selling millions of dollars of Enron stock while making these false statements.

In July 2005, the jury acquitted Defendants on some counts but could not reach a verdict on others. Yeager was acquitted of the conspiracy, wire fraud, and security fraud counts. Hirko was acquitted of some of the insider trading and money laundering counts; and Shelby was acquitted of some of the insider trading counts. Because the jury hung on the remaining counts, the district court declared a mistrial on those counts. The district court also granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[3]

In November 2005, the Government obtained new indictments against Defendants. These post-trial indictments recharged Shelby and Hirko with all of the mistried counts and recharged Yeager with some of the mistried insider trading and money laundering counts. The indictments recharged Yeager with five counts of insider trading and eight counts of money laundering;

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[3] Rule 29 of the Federal Rules of Criminal Procedure states in relevant part: "If the jury has failed to return a verdict, the court may enter a judgment of acquittal." Fed. R. Crim. P. 29(c)(2).

Hirko with one count of conspiracy, one count of securities fraud, and five counts of insider trading; and Shelby with one conspiracy count, one securities fraud count, and four counts of insider trading. Shelby and Hirko moved to dismiss all of the recharged counts, except for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko. Yeager moved to dismiss all of the mistried insider trading and money laundering counts.[4] Defendants contend that their previous acquittals collaterally estopped the Government from pursuing these charges. The district court denied their motion.

II.

Whether collateral estoppel bars a subsequent criminal prosecution is a question of law that we review *de novo*. *United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997).

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[4] In addition to the recharged counts, Yeager moved to dismiss the mistried counts in the indictment the Government secured before the trial ("the old indictment") but not in the November 2005 indictment ("the new indictment"). The Government maintains that it can prosecute Yeager under both the new and old indictments and, therefore, can retry him on all of the insider trading and money laundering counts. Therefore, Yeager moved to dismiss both indictments, contending that collateral estoppel precludes the Government from retrying him on any of the mistried counts. Because the Government does not dispute Yeager's contention that the collateral estoppel analysis is the same for all of the mistried counts, we do not differentiate between the two indictments here.

III.

The Fifth Amendment's guarantee against double jeopardy incorporates the collateral estoppel doctrine. *Ashe v. Swenson*, 397 U.S. 436, 443-44 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. As traditionally understood, the Double Jeopardy Clause precludes multiple prosecutions and multiple punishments for the same offense. *See United States v. Odutayo*, 406 F.3d 386, 392 (5th Cir. 2005). *Ashe*, however, limits successive prosecution of defendants, not for the same offenses but for different offenses.[5] After an acquittal, *Ashe* bars the government from prosecuting defendants on a different charge "if one of the facts *necessarily determined* in the former trial is an essential element of the subsequent prosecution." *Brackett*, 113 F.3d at 1398. Defendants asserting collateral estoppel carry the burden to make this

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[5] In Ashe, masked gunmen robbed a group of men playing poker at a residence. Ashe, 397 U.S. at 437. The government alleged that the defendant was one of the gunmen and charged the defendant with the armed robbery of one of the players. Id. at 438. Neither party disputed the facts that an armed robbery had occurred and that the gunmen had taken the victim's property. Id. The only dispute was whether the defendant was one of the robbers. See id. After the jury acquitted the defendant for lack of sufficient evidence, the government prosecuted him for robbing one of the other poker players. Id. at 439. According to the Court, "the jury by its verdict found that he had not [been one of the robbers]," and, under the doctrine of collateral estoppel, the second prosecution was impermissible. Id. at 445.

showing. *Dowling v. United States*, 493 U.S. 342, 350 (1990) ("The Court of Appeals have unanimously placed the burden on the defendant to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding.").

To determine whether collateral estoppel bars a subsequent criminal prosecution, courts must conduct a two-step analysis. *Bolden v. Warden, W. Tenn. High Sec. Facility*, 194 F.3d 579, 584 (5th Cir. 1999). "Initially, we must decide which facts necessarily were decided in the first proceeding. Then we must consider whether the facts necessarily decided in the first trial constitute essential elements of the offense in the second trial." *Id.* Here, Defendants assert collateral estoppel bars the Government from pursuing all of the current charges against them, except for the conspiracy counts against Hirko and Shelby and the 2001 insider trading counts against Hirko.[6] We engage in this two-step analysis as to each defendant's claims below.[7]

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[6] For convenience purposes, we will refer to all of the counts that Defendants seek to dismiss as the "mistried counts" from this point onward. We recognize that the jury also hung on the conspiracy counts against Defendants Hirko and Shelby and the 2001 insider trading counts against Hirko. But because Defendants Hirko and Shelby do not seek their dismissal, these counts are not at issue here and are, therefore, omitted from our discussion.

[7] While Defendants all argue that collateral estoppel bars a retrial, the specifics of each defendant's argument are different. In this case, each defendant was acquitted of different counts and now seeks to dismiss different counts. Therefore, we must analyze each defendant's collateral estoppel argument separately.

A. Rex Shelby

Shelby was acquitted of the four insider trading counts related to his sale of Enron stock in the summer of 2000 ("Summer 2000 Insider Trading Counts"). The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, the four wire fraud counts, the four insider trading counts related to trades he conducted between January and March 2000 ("Early 2000 Insider Trading Counts"), and all the money laundering counts. After the jury rendered its verdict, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts. Shelby now contends that, under collateral estoppel, these acquittals preclude the Government from retrying him on the securities fraud count and the Early 2000 Insider Trading Counts. This argument is unpersuasive.[8]

1. Jury Acquittals

Based on his review of the record, Shelby claims that the jury necessarily came to one of three potential conclusions when it acquitted him of the Summer 2000 Insider Trading Counts: (1) he did not withhold

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[8] Shelby does not contend that collateral estoppel applies to the conspiracy to commit securities and wire fraud count. Shelby argues, however, that, if we decided that collateral estoppel precludes the Government from retrying him on the securities fraud and the Early 2000 Insider Trading Counts, then collateral estoppel also would bar the Government from introducing some evidence in a retrial of the conspiracy count. Because we find that collateral estoppel does not bar a retrial of any of the mistried counts, we do not address this issue here.

material information from the public, (2) there was no scheme to defraud, or (3) he lacked the intent to defraud. Because any one of these findings would bar the Government from prosecuting him on the securities fraud count and the Early 2000 Insider Trading Counts, Shelby seeks dismissal of these counts.

After an extensive examination of the record, we conclude that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts on another basis: it determined that he did not "use" undisclosed, material information when he made the sales. Shelby testified that he sold shares of his Enron stock in 2000 because he was uncomfortable with being in the stock market and that he relied on his friend David Berberian's advice as to when to sell. Moreover, in the summer of 2000, Shelby immediately exercised options that vested and promptly sold the shares that he received. Because Shelby sold those shares as soon as possible, the jury could have concluded that Shelby conducted the summer 2000 trades due to his discomfort with the stock market.[9]

Shelby argues that the jury could not have acquitted him on this basis because the jury instructions did not explain the relevance of "using" insider information to

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[9] Shelby conducted four trades in June and July of 2000. He sold shares of Enron stock on June 26, June 27, June 29, and July 19. The sale on July 19 involved options different from those involved in the June sales, which vested in late June. It is not clear from the record, however, when the options Shelby exercised in July vested. But because the July sale was so close in time to the June sales, we find that the jury could have reasonably decided that all of the summer 2000 trades were motivated by Shelby's distrust of the stock market.

insider trading. According to Shelby, the elements of insider trading do not include the word "uses," and the district court's explanation of the word "uses" does not immediately follow its instruction on the elements of insider trading.

We reject Shelby's selective reading of the jury instructions. In the jury instructions related to insider trading, the district court stated that "the law forbids [a person possessing insider information] from using that insider information in buying or selling the securities in question." The district court further explained that "[a] person 'uses' material, non-public information in connection with a stock purchase or sale if that information is a factor in his decision to purchase the stock." Therefore, these instructions were clear that the jury had to acquit Shelby of insider trading if it did not find that Shelby both: (1) had insider information and (2) was motivated by this information when he traded.

Because we find that the jury could have acquitted Shelby of the Summer 2000 Insider Trading Counts by concluding that these trades were not motivated by insider information, collateral estoppel does not preclude a retrial of the Early 2000 Insider Trading Counts and the securities fraud count. Shelby is correct that collateral estoppel would bar the Government from retrying Shelby on the Early 2000 Insider Trading Counts if the jury determined that he also did not use insider information when he conducted these trades. The jury, however, did not necessarily make this finding. In acquitting Shelby of the later counts, the jury could have differentiated between the two different sets of trades. The jury could have found that Shelby

did not use insider information when he conducted the trades that underlie the Summer 2000 Insider Trading Counts but did use insider information when he conducted the trades that underlie the Early 2000 Insider Trading Counts.

The evidence at trial supports this distinction. In the summer of 2000, Shelby traded after exercising options as soon as they vested. But from January through March of 2000, Shelby traded after exercising options that vested in June 1999. From this delay, the jury could have rationally concluded that Shelby purposely waited for the stock price to go up before exercising his 1999 options and that Shelby knew the price would go up because of his knowledge of insider information.[10] In contrast, Shelby exercised his 2000 options immediately after they vested. Thus, because the jury could have made this timing distinction, it did not necessarily make a factual determination that would bar a subsequent prosecution on the Early 2000 Insider Trading Counts.[11]

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[10] Shelby alleges that he did not exercise his 1999 options immediately after they vested because the market price of Enron stock at the time was lower than the option strike price. Moreover, Shelby contends that he exercised these options in 2000 when "they now had value." But evidence indicates that Enron stock "had value" long before the time he conducted his trades. The price of Enron stock began to rise precipitously in late November 1999. Therefore, Shelby's argument is unpersuasive because Shelby could have exercised those options in late 1999 instead of waiting until the stock price was well above the strike price.

[11] Shelby alleges that the jury could not have made a timing distinction when it acquitted him of the Summer 2000 Insider Trading Counts because neither the Government nor Shelby

Similarly, the four insider trading acquittals do not estop the Government from retrying Shelby for securities fraud. As discussed above, the jury could have acquitted Shelby of the four insider trading counts because it concluded that he did not use insider information in making the underlying trades. But this determination is not dispositive as to whether Shelby engaged in securities fraud. "Using" insider information in making trades is not an element of securities fraud.[12]

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argued this distinction at trial. Moreover, Shelby points out that he had the same defense against all the insider trading counts: he traded because he was uncomfortable in the stock market, and he followed the advice of his friend, Berberian. From the evidence presented at trial, however, we find that the timing distinction is obvious and one that the jury could have made on its own. Therefore, the jury could have accepted Shelby's defense for one set of counts and not the other.

[12] The district court instructed the jury that it could convict Defendants of securities fraud if it found that the Government had proven three essential elements beyond a reasonable doubt:

> First: That in connection with the purchase or sale of Enron stock, the defendant did any one or more of the following:
>
> > (1) employed a device, scheme, or artifice to defraud as charged in the Indictment; or
> >
> > (2) made any untrue statement of a material fact, or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading as charged in the Indictment; or
> >
> > (3) engaged in an act, practice, or course of conduct that operated, or would operate, as a fraud and deceit on any person as charged in the Indictment;
>
> Second: That the defendant acted willfully, knowingly, and with the intent to defraud; and
>
> Third: That the defendant used, or caused to be used, any

Therefore, because the jury could have acquitted Shelby by concluding that he did not use insider information, Shelby has not shown that the jury necessarily made a factual determination that would bar a retrial of the securities fraud count.

2. Rule 29 Acquittals

We reject Shelby's contention that his Rule 29 wire fraud acquittals collaterally estop the Government from retrying him on insider trading or securities fraud. After the jury rendered its verdict, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the money laundering counts and the wire fraud counts.[13] While Rule 29 acquittals may collaterally estop the government from bringing a subsequent prosecution, *see United States v. Bernhardt*, 840 F.2d 1441, 1447-48 (9th Cir. 1988), we find that they do not preclude a retrial in this case.

As with jury acquittals, Rule 29 acquittals collaterally estop the government from relitigating only the factual issues that were necessarily decided to reach the verdict. *See id.* at 1448. Because courts issue Rule 29 acquittals, collateral estoppel in this scenario applies to the factual determinations the court, and not the jury, made to acquit. Here, the district court granted Shelby's Rule 29 motion for judgment of acquittal on the wire fraud counts because it found that there was no evidence that Shelby had any involvement

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means or instrumentality of interstate commerce or of the mails.

[13] Shelby does not allege that the Rule 29 money laundering acquittals have any collateral estoppel effect.

with the allegedly fraudulent press releases underlying those counts. According to the district court, the Government could not prove that Shelby used interstate wire communications facilities to carry out an illegal scheme without this evidence.[14] Whether Shelby used interstate wire communications, however, is not essential to either insider trading or securities fraud. Therefore, we find that the Rule 29 wire fraud acquittals do not bar the Government from retrying the remaining insider trading counts or the securities fraud count.[15]

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[14] At trial, the district court instructed the jury that it could convict Defendants of wire fraud only if the Government proved:

> First: That the defendant[s] knowingly devised or intended to devise a scheme to defraud, as described in the indictment;
>
> Second: That the defendant[s] acted with a specified intent to defraud;
>
> Third: That the defendant[s] used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and
>
> Fourth: That the scheme to defraud employed false material representations.

[15] Shelby asserts that the absence of evidence that he participated in the press releases establishes that he was not part of a scheme to defraud, rather than that he did not use interstate wire communications facilities. According to Shelby, he stipulated to having used interstate communications at trial. Therefore, he argues that the district court should have granted his Rule 29 motion for judgment of acquittal on the wire fraud counts by finding that he was not involved in a scheme to defraud. Moreover, he contends that we should apply collateral estoppel using this finding instead of the one the district court actually made.

Shelby's argument lacks merit. The district court was clear that it granted Shelby's Rule 29 motion because it found that he did not use interstate communications. Even assuming that Shelby

B. Joseph Hirko

Hirko was acquitted of twelve counts of money laundering related to monetary transactions he conducted in 2000 ("the Money Laundering Counts") and two counts of insider trading related to his sale of Enron stock in February and April 2000. The jury hung on the conspiracy to commit securities and wire fraud count, the securities fraud count, four counts of wire fraud, and five counts of insider trading. Hirko now contends that the acquittals on the 2000 Money Laundering Counts collaterally estop the Government from retrying him on the securities fraud count, the wire fraud counts, and the two remaining insider trading counts related to his May 2000 trades.[16] We find Hirko's argument unconvincing.

To acquit him on the Money Laundering Counts, Hirko contends, the jury must have found that he did not engage in insider trading when he sold shares of Enron stock in May 2000 or commit securities fraud or wire fraud. A party commits money laundering by "knowingly engag[ing] in a monetary transaction in criminally derived property of a value greater than $10,000." *United States v. Freeman*, 434 F.3d 369, 377

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is correct that the district court erred in making this finding, Shelby cites no case law that allows us to apply collateral estoppel based on what the court should have found instead of what it explicitly claimed to have found.

[16] Because Hirko does not contend that collateral estoppel bars the Government from retrying him on insider trading related to his 2001 trades, we do not address these counts here. Therefore, when we refer to "insider trading" as it relates to Hirko, we are referring only to insider trading related to his 2000 trades.

(5th Cir. 2005). At trial, Hirko stipulated to having engaged knowingly in monetary transactions involving more than $10,000. Both parties also acknowledged that the bulk of the funds involved in the transactions underlying the Money Laundering Counts came from Hirko's sale of Enron stock in 2000. Therefore, Hirko argues, the only issue the jury had to decide to convict him on the Money Laundering Counts was whether his sale of Enron stock was unlawful, making these funds "criminally derived." Because of the way the Government tried the case, Hirko alleges that the jury could have found that his 2000 sales were unlawful if it concluded that he committed securities fraud, wire fraud, or insider trading.

While the Government charged him with having committed various different types of fraud, Hirko argues that the Government contended at trial that all of these fraudulent acts were part of a grand scheme to defraud the investing public. According to Hirko, the Government claimed that Defendants made material misrepresentations and omissions, thereby committing securities fraud and wire fraud, to "pump Enron's stock price" so that they could then profit from insider trading by selling their shares of Enron stock at the artificially inflated price. Under the Government's theory, all of Hirko's allegedly fraudulent acts played a role in generating the funds involved in the Money Laundering Counts, and Hirko contends that the district court instructed the jury to that effect.[17] In the

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[17] The district court instructed the jury that it could convict Defendants of money laundering if it found that the Government had proven five essential elements beyond a reasonable doubt:

First: That the defendant engaged or attempted to engage

jury instructions for money laundering, the district court explained that funds were criminally derived in this case if the jury determined that Hirko transacted in funds resulting from wire fraud, securities fraud, or insider trading. Therefore, Hirko contends that the jury could have acquitted him of the Money Laundering Counts only by finding that he did not commit securities fraud, wire fraud, or insider trading.

Hirko's argument falls under its own weight. Under the jury instructions for money laundering, the Government must prove that the funds transacted were "derived from a specified unlawful activity," which the district court defined as "wire fraud" or "fraud in the sale of securities." Because Hirko stipulated to the other elements, he contends that the jury concluded that he did not commit any of these acts when it acquitted him of the Money Laundering Counts. But Hirko's analysis is flawed because, under his argument, the jury must find that he committed "a specified unlawful activity" as a precondition to convicting him on the Money Laundering Counts. Thus, if the jury

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in a monetary transaction;

Second: That the monetary transaction involved criminally derived property of a value greater than $10,000;

Third: That the property was in fact derived from a specified unlawful activity, that is, wire fraud in violation of Title 18, United States Code, Section 1343, and fraud in the sale of securities in violation of Title 15, United States Code, Sections 78j(b) and 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5;

Fourth: That the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and

Fifth: That the transaction took place in the United States.

could not decide whether Hirko committed "a specified unlawful activity," then it would have to acquit him on the Money Laundering Counts.

In fact, that is seemingly what happened here. In addition to money laundering, Hirko was also charged with securities fraud, wire fraud, and insider trading, and the jury hung on these counts. Since it could not determine whether Hirko committed these acts, the jury then could not convict Hirko on the Money Laundering Counts and had to acquit. Because Hirko has failed to show that the jury necessarily found that he did not commit fraud or insider trading, collateral estoppel does not bar the Government from retrying Hirko on the securities fraud, wire fraud, and the insider trading counts.

C. F. Scott Yeager

Yeager was acquitted of securities fraud, four counts of wire fraud, and conspiracy to commit securities fraud and wire fraud. The jury hung on 20 counts of insider trading and 99 counts of money laundering. Yeager now argues that, in acquitting him, the jury necessarily found that he did not have insider information, and, therefore, collateral estoppel bars the Government from retrying him on insider trading and money laundering. For the reasons below, we find that Yeager is correct that the jury, acting rationally, could have acquitted Yeager on securities fraud only by concluding that he did not have insider information. But because Yeager was also charged with insider trading and money laundering and the jury hung on those counts, we find that collateral estoppel, under our precedent, does not bar a retrial in this case.

1. Securities Fraud

Considering only the jury instructions, we conclude that there are four rational bases the jury could have used to acquit Yeager on securities fraud. The Government charged Yeager with securities fraud for making material misrepresentations or omissions at the 2000 analyst conference. As discussed above, the district court instructed the jury that it could convict Yeager on securities fraud only if it determined that the Government had proven three elements beyond a reasonable doubt: (1) Yeager participated in making material misrepresentations or omissions; (2) Yeager acted "willfully, knowingly, and with the intent to defraud"; and (3) Yeager used "[a] means or instrumentality of interstate commerce or of the mails." Because neither party contends that the third element is at issue, the jury must have decided, in acquitting Yeager, that the Government did not carry its burden as to the first or second elements. Two reasons the Government might not have succeeded in carrying its burden as to the first element are: (1) it failed to show there were misrepresentations or omissions made at the analyst conference; or (2) it failed to show that Yeager participated in making material misrepresentations or omissions. Two reasons the Government might not have succeeded in carrying its burden as to the second element are: (1) it failed to show that Yeager knew the presentations given at the analyst conference were fraudulent when they were made; or (2) it failed to show that any misrepresentations or omissions Yeager made were intentional rather than negligent.

After reviewing the record, we conclude that the jury could have acquitted Yeager on the basis of the first element by concluding that there were no misrepresentations or omissions made at the conference. At trial, Defendants presented evidence that the conference presentations did not contain falsehoods and that the omitted information was not material so as to render the presentations misleading. The jury could have found this evidence convincing.

We also conclude, however, that the jury could not have acquitted Yeager by finding that, while there were misrepresentations or omissions made, Yeager did not participate in making them. While both parties acknowledge that Yeager did not give a presentation at the analyst conference, the Government argued strenuously at trial that Yeager helped shape the message of the conference presentations, which Yeager did not dispute. Under the jury instructions, Yeager participated in making material misrepresentations or omissions as long as he "caused the statement[s] to be made or the fact[s] to be omitted." Therefore, if the jury concluded that the presentations were fraudulent, the jury could not have acquitted Yeager on the grounds that he did not participate in the fraud.

From our examination of the record, we additionally find that the jury could have acquitted Yeager on the basis of the second element by finding that Yeager did not knowingly make misrepresentations and omissions because he believed the presentations were truthful. Yeager's main defense at trial was that he thought the conference presentations were truthful because of his good faith reliance on information that he received from

others. Therefore, the jury could have acquitted Yeager for this reason.

We conclude, however, that the jury could not have acquitted Yeager for negligently making material misrepresentations or omissions. The district court instructed the jury that Defendants must have been at least reckless when making material misrepresentations or omissions to be guilty of securities fraud. But it was undisputed that Yeager, as Senior Vice President of Strategic Development, helped plan the conference message. Therefore, if the jury determined that Yeager possessed information that contradicted the presentations, the jury could not have found that he was negligent in dispensing falsehoods to the public.

In sum, our review of the record demonstrates that the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful. Under either rationale, the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public.[18] The insider trading counts are based on allegations

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[18] The Government did not contend at trial nor does it contend here that Yeager could have discovered insider information after the conference. Therefore, if the jury found that Yeager did not have insider information at the conference, it must also have found that he did not have insider information when he conducted his trades in the subsequent months.

that Yeager had insider information when he conducted his trades because he knew that the information released to the public was fraudulent. Therefore, the jury seemingly made a finding that precludes the Government from now prosecuting him on insider trading and money laundering.[19] Accordingly, when we consider the acquittals by themselves, it appears that Yeager is correct that collateral estoppel bars a retrial.[20]

The problem in this case, however, is that the same jury hung on the insider trading counts. If Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would also have acquitted Yeager of the insider trading counts. Thus, when we consider the hung counts along with the acquittals, we are faced with a potential inconsistency, making it impossible for us to decide with any certainty what the jury necessarily determined. Whether we can weigh hung counts in applying collateral estoppel then is crucial to our analysis. Because, as discussed below,

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[19] Yeager is charged with money laundering based on transacting in money generated from trades he conducted allegedly on the basis of insider information. Therefore, the finding that Yeager did not have insider information would also preclude the Government from retrying him for money laundering.

[20] Yeager also was acquitted of four counts of wire fraud and conspiracy to commit securities fraud and wire fraud. Yeager argues that, in acquitting him of these counts, the jury must also have found that he did not possess insider information. Because we determine that Yeager is correct that the jury must have so concluded when it acquitted him of securities fraud, it is unnecessary for us to determine whether the jury made the same conclusion when it acquitted Yeager of these other counts.

we conclude that our precedent dictates that we must, we find that we cannot apply collateral estoppel in this case.

2. *United States v. Larkin*

We have addressed before the question of how collateral estoppel applies when the jury acquitted on some counts but hung on related counts. In *United States v. Larkin*, we rejected the defendant's assertion that the jury necessarily determined that he was not part of a conspiracy when it hung on the conspiracy count but acquitted him of various counts of vicarious liability. 605 F.2d 1360, 1370 (5th Cir. 1979), *withdrawn in part on other grounds*, 611 F.2d 585 (5th Cir. 1980). In applying *Ashe*, the *Larkin* court laid out the various rational bases on which the jury could have acquitted the defendant. *Id.* We then ruled out the possibility that the jury acquitted the defendant of vicarious liability because it found that he was not a member of a conspiracy. *Id.* at 1370-71. According to the Court, "No rational jury could have absolved [him] of [vicarious liability] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit him on the conspiracy charge itself." *Id.* Therefore, *Larkin* requires that we consider mistried counts in our collateral estoppel analysis; and, in particular, under *Larkin*, the presence of mistried counts diminishes the likelihood that, in acquitting defendants on related counts, the jury made a factual determination that bars a retrial.

Yeager contends that collateral estoppel precludes the Government from retrying him for insider trading and money laundering. According to Yeager, the jury

necessarily determined that he did not have insider information when it acquitted him and that no jury can convict him on insider trading and money laundering if he did not have insider information. But even if Yeager is correct that the jury could have acquitted him on the fraud and conspiracy counts only if it found that he did not have insider information, that does not end our inquiry as to what the jury necessarily decided at trial because, under *Larkin*, we must also take into consideration the mistried counts. As we similarly noted in *Larkin*, if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering. Instead, the jury hung.

The result is a discrepancy that has four possible explanations. One possibility is that the jury was irrational and came to two inconsistent conclusions. When considering the fraud and conspiracy counts, the jury decided that Yeager did not have insider information. When considering the insider trading and money laundering counts, the jury decided that Yeager had insider information but hung for other reasons. Another possibility, as the Government speculates, is that the jury decided that Yeager had insider information when considering both sets of counts, but, for some unknown reason, it nonetheless acquitted Yeager on some of them. A third possibility is that the jury decided that Yeager did not have insider information when considering both sets of counts, but, for some unknown reason, it failed to push all of them through to acquittals. Finally, a fourth possibility is that the jury decided that Yeager did not have insider information when it acquitted him on the fraud and conspiracy counts and simply did not reach the issue

when it considered the hung counts because it could not agree on whether the Government had carried its burden as to the other elements.

Because it is impossible to determine why the jury hung, we find that collateral estoppel does not bar a retrial in this case. In the first scenario, collateral estoppel would not bar a retrial because, if the jury irrationally came to two inconsistent conclusions, we cannot say that it came to any definitive conclusion. In the second scenario, collateral estoppel would not bar a retrial because the jury found that Yeager had insider information. In the third and fourth scenarios, however, collateral estoppel would preclude a retrial because the jury concluded that Yeager did not have insider information. Under *Ashe*, however, the burden is on defendants to show that the jury necessarily determined the issue that they seek to foreclose. *Brackett*, 113 F.3d at 1398. Given the evidence at trial, whether Yeager had insider information was a close issue, and the jury could have come to the conclusions in any of these four scenarios. Therefore, we cannot determine with any certainty which scenario Yeager's case falls under, and we cannot conclude what the jury necessarily decided. Because Yeager failed to carry his burden and establish what the jury necessarily decided, we find that collateral estoppel does not bar the Government from retrying Yeager on the insider trading and money laundering counts.

3. *United States v. Powell*

Finally, we note that we are not extending, at the Government's urging, *United States v. Powell*, 469 U.S. 57 (1984), to preclude applying collateral estoppel

where a jury acquitted defendants on some counts but hung on related counts. Many of our sister circuits have rejected this argument in similar cases. *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007); *United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997); *United States v. Bailin*, 977 F.2d 270, 276 (7th Cir. 1992); *United States v. Frazier*, 880 F.2d 878, 883 (6th Cir. 1989). *Contra United States v. White*, 936 F.2d 1326 (D.C. Cir. 1991). Because our finding does not rely on *Powell*, however, these cases do not affect our analysis.

Powell bars applying collateral estoppel in cases where there are inconsistent verdicts. In *Powell*, the Court found that collateral estoppel cannot apply to reverse a conviction when the jury both acquitted and convicted defendants of related counts.[21] *Powell*, 469 U.S. at 68. According to the Court, the doctrine of collateral estoppel is "no longer useful" when the same jury reached inconsistent verdicts because collateral estoppel is "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *Id.*

In the cases before our sister circuits, the Government has argued, as it does here, for an extension of *Powell*. The Government maintains that *Powell* precludes applying collateral estoppel in cases

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[21] In Powell, the defendant was acquitted of various drug felonies but convicted of facilitating those felonies. 469 U.S. at 60. Because an element of the facilitation counts is that she committed the felonies that she allegedly facilitated, the defendant argued that collateral estoppel required overturning the convictions. See id. at 68. The Court found the defendant's argument unconvincing. Id.

where the jury acquitted defendants on some counts but hung on related counts because this result is also inconsistent. The Sixth, Seventh, Ninth, and Eleventh Circuits rejected this argument because they found that acquittals are not inconsistent with mistried counts. *Ohayon*, 483 F.3d at 1289; *Romeo*, 114 F.3d at 144; *Bailin*, 977 F.2d at 279-80; *Frazier*, 880 F.2d at 883. As the Sixth Circuit noted, "[n]o such inconsistency is necessarily present" because "[b]oth the acquittal and the failure to agree could result from a number of factors." *Frazier*, 880 F.2d at 883.

While we arrive at what appears to be a contrary decision, we do not disagree with our sister circuits. As we acknowledged above, there are four possibilities as to how to reconcile Yeager's acquittals with the mistried counts, and only in one of these possibilities must the jury have been inconsistent. In short, we concur with our sister circuits that it is impossible to discern definitively why a jury hung. Therefore, we also reject the Government's argument because it requires us to necessarily find an inconsistency where one may not exist.

Where we part ways with our sister circuits is that they ignored the mistried counts after they determined that *Powell* does not apply. Because our precedent dictates that we weigh mistried counts, however, we cannot do the same. Under *Ashe*, the burden is on defendants to show that the jury necessarily determined the issue they seek to foreclose in their favor. Therefore, collateral estoppel cannot apply if the uncertainty raised by the mistried counts, which we must consider under *Larkin*, precludes Yeager from meeting this burden. For the reasons above, we find

that it does.[22] In sum, we agree with our sister circuits that *Powell* does not bar applying collateral estoppel when a jury acquitted defendants on some counts but hung on related counts. But we conclude that *Ashe* precludes applying collateral estoppel in this scenario because Yeager has failed to show that the jury necessarily determined that he did not have insider information.

IV.

For the aforementioned reasons, we AFFIRM the district court's denial of Defendants' motion to dismiss under the doctrine of collateral estoppel.

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[22] We can only speculate as to why our sister circuits did not also consider the mistried counts in its analysis under Ashe. While our precedent requires us to weigh mistried counts in determining whether collateral estoppel applies under the Ashe framework, the other circuits may not be similarly bound by their precedent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	§	[Filed: August 31, 2006]
	§	
vs.	§	**CRIMINAL NO. H-03-93**
	§	
JOSEPH HIRKO (4)	§	

AMENDED ORDER*

Pending before the Court is Defendant Joseph Hirko's Motion to Dismiss Counts 2 through 6, 25 and 26 of the Fifth Superseding Indictment and Counts 2 through 6 of the Seventh Superseding Indictment on Grounds of Collateral Estoppel **(Instrument No. 935)**, filed on December 8, 2005.

I.

On March 11, 2003, the United States of America filed a multiple-count Indictment against Defendants Joseph Hirko, Kevin Howard, Scott Yeager, Rex Shelby, Michael Krautz (hereinafter "Defendants") and former Defendants Kenneth Rice and Kevin Hannon, charging them with conspiracy to commit wire fraud and securities fraud, and substantive counts of wire fraud, securities fraud, insider trading, and money laundering. The government filed a Fourth Superseding

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* This Order was amended to correct minor citation and typographical errors prior to publication.

Indictment on July 22, 2004. (Instrument No. 340). On November 5, 2004, the government filed a Fifth Superseding Indictment. (Instrument No. 468). During the relevant times in the Indictment, Defendants served in various positions as executives to Enron Communications, Inc., later renamed as Enron Broadband Services ("EBS").

In the Fifth Superseding Indictment, Count One charged Defendant Hirko with conspiracy to commit securities fraud and wire fraud. (Instrument No. 468). Count Two of the Indictment charged Defendant Hirko with the substantive offense of securities fraud in connection with alleged false statements and material omissions made at a January 20, 2000 Analyst Conference. (*Id.*). Counts Three through Six charged Defendant Hirko with the substantive offense of wire fraud in connection with press releases issued by Enron Broadband Services on January 31, 2000 through May 15, 2000. (*Id.*). Counts Twenty-Three through Twenty-Six charged Defendant Hirko with insider trading based on trades of Enron stock made on February 18, 2000 through May 12, 2000. (*Id.*). Counts One Hundred Seventy-Two through One Hundred Seventy-Four charged Defendant Hirko with insider trading based on trades of Enron stock made on January 23, 2001 through January 26, 2001. Counts One Hundred Seventy-Five through One Hundred Seventy-Six charged Defendant Hirko with money laundering based on transactions on January 30, 2001 through February 1, 2001. (*Id.*).[1]

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[1] Each of the Counts against Defendant Hirko incorporated the same factual allegations stated in Paragraphs 1 through 33 of the Indictment. Specifically, each Count stated that "[t]he allegations in paragraphs 1 through 33 . . . are realleged as if fully set forth

On April 18, 2005, through July 13, 2005, this Court conducted a jury trial on all of the charges pending against the Defendants. On July 20, 2005, the jury returned a verdict of not guilty for Defendant Hirko on Counts 23 and 24 charging insider trading based on trades on February 18, 2000 and April 20, 2000, respectively. The jury also returned a verdict of not guilty for Defendant Hirko on Counts 55 through 66 charging money laundering based on transactions made in the year 2000. (Instrument No. 869). The jury did not enter a verdict on the conspiracy count (Count 1), wire fraud counts (Counts 2-6), two counts of insider trading based on trades in May 2000 (Counts 25-26), three counts of insider trading based on trades in January 2001 (Counts 172-174), and money laundering counts based on transactions in January and February 2001 (Counts 175-176). As to these counts, the jury indicated that they were hopelessly deadlocked. (*Id.*).

On November 9, 2005, the government filed a Seventh Superseding Indictment charging Defendant Hirko with conspiracy to commit securities and wire fraud, securities fraud related to alleged false statements and omissions made at the 2000 Analyst Conference, two counts of wire fraud for press releases issued on April 11, 2000 and May 15, 2000, two counts of insider trading for trades made in May 2000, and three counts of insider trading based on trades made in January and February 2001. (Instrument No. 915). The Seventh Superseding Indictment indicated the government's intention to retry Defendant Hirko on the conspiracy, securities fraud, wire fraud and insider trading counts for which the jury failed to render a

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here." The Counts then set forth the specific charges against Defendant Hirko. (See, e.g., Count One, below).

verdict. (Instrument No. 915). The Seventh Superseding Indictment removes all of the counts on which Defendant Hirko received a verdict of not guilty, but the Indictment is based on factual allegations similar to those asserted in the Fifth Superseding Indictment. (*Id.*). A comparison of the counts alleged in the Fifth Superseding Indictment and the Seventh Superseding Indictment is set forth below.

United States v. Joseph Hirko (Cr. No. 03-0093-7) Conversion Chart for Counts Relating to Joseph Hirko	
5th Superseding Indictment United States v. Hirko, et al. (Cr. No. 03-0093-5)	**7th Superseding Indictment, United States v. Hirko (Cr. No. 03-0093-7)**
1 (Conspiracy to Commit Securities and Wire Fraud)	1
2 (Securities Fraud: 2000 Analyst Conference)	2
3 (Wire Fraud – 1/31/00 Press Release)	(Government elected not to include in Seventh Superseding Indictment)

4 (Wire Fraud – 3/30/00 Press Release)	(Government elected not to include in Seventh Superseding Indictment)
5 (Wire Fraud – 4/11/00 Press Release)	3
6 (Wire Fraud – 5/15/00 Press Release)	4
23 (Insider Trading, 2000 – Joseph Hirko)	(Jury Acquittal)
24 (Insider Trading, 2000 – Joseph Hirko)	(Jury Acquittal)
25 (Insider Trading, 2000 – Joseph Hirko)	5
26 (Insider Trading, 2000 – Joseph Hirko)	6
55 - 66 (Money Laundering, 2000 – Joseph Hirko)	(Jury Acquittal)
172 (Insider Trading, 2001 – Joseph Hirko)	11

173 (Insider Trading, 2001 – Joseph Hirko)	12
174 (Insider Trading, 2001 – Joseph Hirko)	13
175 - 176 (Money Laundering, 2001 – Joseph Hirko)	(Government elected not to include in Seventh Superseding Indictment)

On December 8, 2006, Defendant Joseph Hirko filed a Motion to Dismiss Counts 2 through 6, 25 and 26 of the Fifth Superseding Indictment and Counts 2 through 6 of the Seventh Superseding Indictment on Grounds of Collateral Estoppel. (Instrument No. 969). Under the Double Jeopardy Clause of the Fifth Amendment and Doctrine of Collateral Estoppel, Defendant Hirko argues that the crimes charged in Counts 2 (securities fraud), Counts 3 through 6 (wire fraud), and Counts 25 and 26 (insider trading) of the Fifth Superseding Indictment; and Counts 2 (securities fraud), 3 and 4 (wire fraud), and 5 and 6 (insider trading) of the Seventh Superseding Indictment, were effectively litigated and decided against the government in the first trial. (Instrument No. 885). Defendant Hirko has not moved to dismiss Count 1 (conspiracy to commit wire and securities fraud) of the Fifth Superseding Indictment or Seventh Superseding Indictment. (*Id.*). Defendant Hirko has also not moved to dismiss Counts 172 through 174 of the Fifth Superseding Indictment or Counts 11 through 13 of the Seventh Superseding Indictment, which charge insider trading based on trades in January and February 2001.

In support of his Motion, Defendant Hirko argues that "the only rational basis on which the jury could have acquitted Mr. Hirko on the 2000 Money Laundering Counts and the February and April 2000 Insider Trading Counts is by finding that he did not engage in the alleged misrepresentations and omissions that formed the common factual basis of the securities fraud, wire-fraud and insider-trading counts in the Fifth Superseding Indictment." (Instrument No. 935, at 5).

On December 28, 2005, the United States filed a Response to Defendant Hirko's Motion to Dismiss on Grounds of Collateral Estoppel. (Instrument No. 947). The government argues that "[Defendant Hirko's] reliance on generalized verdicts of acquittal on a few counts does not give rise to a conclusion that the jury must have reached a decision that he did not commit the essential elements of the offenses now at issue in the Fifth and Seventh Superseding Indictments." (*Id.* at 3). In addition, the government argues that "the record of the trial . . . fatally undermines Hirko's assertion that the jury's partial verdict acquitting him of counts 23-24 and counts 55-66 of the Fifth Superseding Indictment . . . means that the jury determined that he had not engaged in wire fraud, securities fraud, and insider trading as alleged in the Fifth Superseding indictments." (*Id.* at 3-4). Finally, the government contends that Defendant Hirko's Motion to Dismiss is frivolous and requests that the Court make such a finding in this Order, and proceed with trial as scheduled. (Instrument No. 985).

II.

The Supreme Court has stated that the principle of collateral estoppel in criminal cases is embodied in the

Fifth Amendment's proscription against double jeopardy. *Ashe v. Swenson,* 397 U.S. 436 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. According to the Supreme Court:

> The rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration. The inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.

Id. at 444 (internal citations and quotations omitted).

In the Fifth Circuit, collateral estoppel may affect successive criminal prosecutions in one of two ways. First, "it will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution." *United States v. Brackett,* 113 F.3d 1396, 1398 (5th Cir. 1997). Second, "while the subsequent prosecution may proceed, collateral estoppel will bar the introduction or argumentation of facts necessarily decided in the prior proceeding." *Id.* (citing *United States v. Deerman,* 837 F.2d 684, 690 (5th Cir. 1988)).

"Facts so established in the first trial may not be used in the second trial either as ultimate or as evidentiary facts." *United States v. Mock*, 604 F.2d 341, 343 (5th Cir. 1979).

It is axiomatic that "collateral estoppel bars relitigation only of those facts necessarily determined in the first trial." *Brackett*, 113 F.3d at 1398 (quoting *Deerman*, 837 F.2d at 690). "When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue." *Id.* at 1398-99 (quoting *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980) (emphasis in original)). Thus, "the first step in resolving a claim of collateral estoppel is to determine which facts were 'necessarily decided' in the first trial." *Id.* at 1398 (citing *United States v. Levy*, 803 F.2d 1390, 1398-99 (5th Cir. 1986); *Mock*, 604 F.2d at 343). "At this first stage of the inquiry, the defendant bears the burden of demonstrating that the issue he seeks to foreclose was 'necessarily decided' in the first trial." *Id.* (citing *Dowling v. United States*, 493 U.S. 342, 350 (1990)).

In a criminal case, the determination of what the jury necessarily decided can be an "awkward" task, because "a general verdict of acquittal does not specify the facts 'necessarily decided' by the jury." *Id.* at 1399. Thus, in making the determination of what the jury necessarily decided, the court "must examine allegations of the indictment, testimony, court's instructions to the jury, and jury's verdict to consider what makes the jury's verdict coherent." *Deerman*, 837 F.2d at 690. This inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, 397 U.S. at 444 (quoting *Sealfon v. United States*, 332 U.S. 575, 579 (1948)).

"Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

With these principles in mind, the Court first turns to the question of whether the government is completely barred from prosecuting Defendant Hirko on the charges contained in Counts 2 through 6, 25 and 26 of the Fifth Superseding Indictment and Counts 2 through 6 of the Seventh Superseding Indictment. Then, the Court will determine whether the government should be prohibited from offering evidence related to the counts upon which Defendant Hirko was acquitted in the first trial.

III.

To resolve the issues presented by Defendant Hirko, the Court must review, among other things, the indictment, the jury charge and verdict, the theory of prosecution, the theory of defense, and the evidence presented at trial. The complexity of this determination is underscored by the incestuous nature of the factual allegations contained in the Indictment.

A.

Paragraphs 1 through 33 of the Fifth Superseding Indictment provide a broad introduction to the Enron Broadband case and alleged schemes to defraud. (Instrument No. 468). Each of the counts on which Defendant Hirko received an acquittal (two counts of insider trading and twelve counts of money laundering) incorporate Paragraphs 1 through 33 of the Indictment. The remaining insider trading, securities fraud, wire fraud, and conspiracy counts, on which the jury

deadlocked, also incorporate Paragraphs 1 through 33. Paragraphs 1 through 10 of the Indictment provide a background description of the parties and Enron Broadband Services. The following Paragraphs 11 through 33, entitled "THE SCHEMES TO DEFRAUD," provide a summary of the alleged schemes to defraud, including the proposal to build the Enron Intelligent Network, a description of alleged false press releases, alleged false statements made at the 2000 Analyst Conference, the Project Braveheart transaction, alleged false statements at the January 2001 Analyst Conference, and "The Defendants' Stock Trading." (Instrument No. 468).[2] Specifically, Paragraph 11 of the Indictment describes the overall summary of the schemes to defraud as follows:

> 11. From at least April 1999 until May 14, 2001, defendants, JOSEPH HIRKO, KEVIN HOWARD, SCOTT YEAGER, REX SHELBY, and MICHAEL KRAUTZ, together with others, engaged in conduct and made false and misleading statements and omitted material information from statements made, all of which were designed to and did deceive the investing public and others about the technological capabilities, value, revenue and business performance of EBS. The defendants executed this scheme by, among other means: (i) causing Enron to issue materially false and misleading press releases; (ii) making and causing others to

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[2] None of the allegations pertaining to the Braveheart Transaction, and alleged false statements at the January 2001 Analyst Conference are relevant to the charges and evidence against Defendant Hirko. Thus, the Court need not address these allegations in the context of the current Motion.

> make materially false and misleading statements to equity analysts and others; (iii) using fraudulent means to generate revenue so that EBS and Enron could appear to reach publicly declared financial targets; and (iv) failing to disclose material adverse information about EBS's poor business performance. During this same time period, defendants HIRKO, YEAGER and SHELBY sold large quantities of Enron stock, generating millions of dollars for themselves.

(Instrument No. 468, at 3-4).

The misrepresentations and omissions underlying both the securities fraud and wire fraud charges involve the same general topics, *i.e.*, allegedly overstating the developmental status or capabilities of the EBS network control software or Broadband Operating System ("BOS") and thereby overstating the current success of the business. The securities fraud count specifically relates to allegedly false statements and omissions at the January 20, 2000 Analyst Conference, and the wire fraud counts specifically relate to false statements and omissions contained in press releases issued by EBS. (*See id.* "Overt Acts" at ¶ 36). In Paragraph 33 of the Indictment, the government provides a temporal link between the wire and securities fraud charges and the insider trading counts, alleging that "[a]t the time when they and others at Enron were making materially false and misleading public statements about EBS, the defendants sold large quantities of Enron stock, generating huge profits. Specifically, between January 20, 2000 and July 28, 2000, HIRKO sold $35,167,761.41 worth of Enron stock." (*Id.* at ¶ 33).

The Indictment does not differentiate what material non-public information Defendant Hirko allegedly possessed and used on each of the dates alleged in the insider trading counts. Rather, the Indictment alleges that "while in possession of material non-public information regarding the technological capabilities, value, revenue and business performance of Enron Communications, Inc. and Enron Broadband Services, HIRKO sold shares of Enron stock . . . generating total proceeds of $35,167,761.41." (*Id.* at ¶ 46). The Indictment then lists the count number, date, number of shares, sale price, and gross proceeds of the stock sale. (*Id.*).

Paragraphs 1 through 33 do not specifically refer to the money laundering counts of the Indictment, or directly tie the money laundering counts to the overall scheme to defraud. However, the acquitted money laundering counts against Defendant Hirko allege that Hirko engaged in "monetary transactions . . . in criminally derived property of a value greater than $10,000 . . . [by] transfers of funds generated through wire fraud and fraud in the sale of securities . . ." The Seventh Superseding Indictment essentially mirrors the substantive factual allegations and format of the Fifth Superseding Indictment. (Instrument No. 915).

B.

1.

After a 3-month trial by jury, the jury entered a verdict of "not guilty" on two insider trading counts against Defendant Hirko, including Count 23 charging Defendant Hirko with insider trading on February 18, 2000; and Count 24 charging Defendant Hirko with insider trading on April 20, 2000. The jury also entered a verdict of "not guilty" on Counts 55 through 66,

charging Defendant Hirko with money laundering in connection with monetary transactions on March 31, 2000 through September 21, 2000. The jury indicated that they were hopelessly deadlocked on the remaining insider trading, conspiracy, securities fraud, and wire fraud counts against Defendant Hirko.

Defendant Hirko argues that collateral estoppel should apply in this case because the money laundering counts, on which he was acquitted, alleged that Hirko engaged in monetary transactions with proceeds from criminally derived property through insider trading, securities fraud and wire fraud. Defendant Hirko argues that, because the government relied on the same common nucleus of alleged misrepresentations and omissions to support the securities fraud, wire fraud and insider trading charges, the only rational way the jury could have acquitted Hirko of money laundering is by finding that the government failed to prove that he engaged in such misrepresentations and omissions, which underlie the insider trading, securities fraud, and wire fraud counts. In essence, the issue presented by Defendant Hirko ultimately asks the Court to determine whether the jury in the first trial rationally could have acquitted him of money laundering, without finding that the government failed to prove Defendant Hirko engaged in insider trading, securities fraud, or wire fraud.

In order to establish the crime of wire fraud the government must prove beyond a reasonable doubt that the defendant (1) knowingly devised or intentionally devised a scheme to defraud; (2) acted with a specific intent to defraud; (3) used or caused another person to use interstate wire communications facilities for the purpose of carrying out the scheme; and (4) that the scheme to defraud employed false material

representations. *United States v. Odiodio*, 244 F.3d 398, 402 (5th Cir. 2001); (Instrument No. 854, at 34).

In order to establish the crime of securities fraud, the government must prove beyond a reasonable doubt that (1) in connection with the purchase or sale of securities, the defendant either (i) employed a device, scheme, or artifice to defraud, or (ii) made any untrue statement or material omission of fact, or (iii) engaged in an act of fraud and deceit; and (2) acted willfully, knowingly, and with the intent to defraud; and (3) used, or caused to be used, any means or instrumentality of interstate commerce or of the mails. (*Id.* at 26).

The crime of insider trading requires proof beyond a reasonable doubt that (1) in connection with the purchase or sale of securities, the defendant employed a device, scheme, or artifice to defraud; (2) the defendant acted willfully, knowingly, and with the intent to defraud; (3) used, or caused to be used, any means or instrumentality of interstate commerce; and (4) used material, nonpublic information in his purchase or sale of Enron stock. *United States v. Smith*, 155 F.3d 1051, 1066 (9th Cir. 1998); (*Id.* at 41-43).

In order to establish the crime of money laundering, the government must prove beyond a reasonable doubt that the defendant (1) engaged or attempted to engage in a monetary transaction; (2) the monetary transaction involved criminally derived property of a value greater than $10,000; (3) the property was in fact derived from a specified unlawful activity, that is, wire fraud or fraud in the sale of securities; (4) the defendant acted knowingly, that is, with knowledge that the transaction involved proceeds of a criminal offense; and (5) that the transaction took place in the United States.

The insider trading, securities fraud, and wire fraud charges of the Indictment each have distinct and separate elements from the money laundering charges, and share no common elements with the money laundering charges. The money laundering charges against Defendant Hirko do, however, identify the funds at issue as "proceeds of specified unlawful activity, that is, wire fraud . . . and fraud in the sale of securities." Thus, a conviction of Defendant Hirko on the wire fraud counts of the Indictment would require evidence sufficient to show that Plaintiff engaged in a specified unlawful activity, *i.e.*, wire fraud, securities fraud, or insider trading. *See United States v. Tencer*, 107 F.3d 1120, 1130-32 (5th Cir. 1997). While an acquittal or dismissal of one of the predicate offenses (e.g., wire fraud, securities fraud, or insider trading) may call into question the validity of any money laundering charges based on that predicate offense, it is unclear whether an acquittal for money laundering would have any effect on the validity of the predicate offense. This is namely because none of the predicate offenses require a showing that the defendant engaged in a monetary transaction to conceal the proceeds of a criminal offense, in order to obtain a conviction on one of the predicate offenses.

Defendant Hirko contends, however, that "the only rational basis on which the jury could have acquitted Mr. Hirko on the 2000 Money Laundering Counts and the February and April 2000 Insider Trading Counts is by finding that he did not engage in the alleged misrepresentations and omissions that formed the common factual basis of the securities-fraud, wire-fraud and insider-trading counts in the Fifth Superseding Indictment." (Instrument No. 936, at 5). Specifically, Defendant Hirko argues that "he did not contest that he

engaged in the monetary transactions at issue or that the transactions involved proceeds from his sale of Enron stock in February, April and May 2000," and "[n]or did he contest that the value of such proceeds was greater than $10,000 or that the transactions at issue took place within the United States." (*Id.* at 7). Thus, Defendant Hirko asserts that "the only 'rationally conceivable issue in dispute' on the money-laundering charges was whether the misrepresentations and omissions Mr. Hirko allegedly made were sufficient to support the government's charges of wire fraud or insider trading." (*Id.*).

First of all, the money laundering counts of the indictment do not require a showing that the defendant made material misrepresentations or omissions. The money laundering counts only require a showing that the defendant knowingly engaged in monetary transactions to conceal property that was derived from a specified unlawful activity, in this case, wire fraud or fraud in the sale of securities. Under the circumstances of this case, the jury could have acquitted Defendant Hirko for any number of reasons, and not because the jury decided that the government failed to establish that Defendant Hirko committed wire fraud or fraud in the sale of securities. For example, the jury could have rationally come to the conclusion that the proceeds contained in the Paine Webber account no. HS 72449 were derived from the sale of stock that did not involve the proceeds of criminal activity. With regard to the amount of criminally derived funds necessary to find a violation of the money laundering statutes, the Court instructed the jury as follows:

> Where a defendant is charged under section 1957 with making a monetary transaction from an account containing money that is derived

> from criminal activity (i.e., "tainted" money), and money that is not derived from criminal activity (i.e., "clean" money), the government must prove beyond a reasonable doubt that there was more than $10,000 of tainted money in the account, and that the defendant transferred from the account an amount of money that exceeds the amount of clean money in the account by more than $10,000. When the aggregate amount withdrawn from an account containing commingled funds exceeds the clean funds, individual withdrawals may be said to be of tainted money, even if a particular withdrawal was less than the amount of clean money in the account.

(Instrument No. 854, at 55-56).

Count 23 of the Fifth Superseding Indictment alleged that Defendant Hirko, while in possession of material non-public information, sold stock on February 18, 2000, resulting in gross proceeds of $6,465,798.63. Count 24 of the Fifth Superseding Indictment alleged that Defendant Hirko, while in possession of material non-public information, sold stock on April 20, 2000, resulting in gross proceeds of $9,236,589.18. At trial, the government directly linked the proceeds allegedly gained in the insider trading counts of the indictment with the amount of money allegedly derived from specified criminal activity (the "tainted funds") in the money laundering counts of the indictment. Government witness Maurice Whalen testified that the net proceeds from the sale of 473,837 shares of stock at issue in Counts 23, 24, 25, and 26 amounted to $9,844,210.92 in net proceeds (gross proceeds-transaction costs). Maurice Whalen further indicated that Defendant Hirko deposited the entire

$9,844,210.92 in net proceeds into Paine Webber account no. HS 72449, and transferred money out of account no. HS 72449 to form the basis of the money laundering Counts 55-65. According to Maurice Whalen's demonstrative exhibit, the only allegedly tainted funds that ever entered account no. HS 72449 (the source account of the monetary transfers) were the proceeds of the stock sales at issue in Counts 23, 24, 25, 26. (GX 3155).

Counts 23 and 24, on which Defendant Hirko received an acquittal, amounted to $5,082,358.39 of the $9,844,210.92 in net proceeds deposited into Paine Webber account no. HS 72449. Thus, the jury could have logically determined that account no. HS 72449 contained at least $5,082,358.39 in clean funds, which exceeds by more than $10,000 the $4,865,598.53 amount of money allegedly laundered in Counts 55 through 63. It is unclear whether the jury applied a similar analysis to Counts 64 through 66, which alleged that Defendant Hirko laundered $4,995,920.96 in funds from account no. HS 72449. However, Maurice Whalen's demonstrative exhibit was not received in evidence, and the total amount of the gross proceeds allegedly gained from insider trading in Counts 23 through 24 amounted to $15,702,387.81, which exceeds the total $7,003,662.96 amount of money allegedly laundered in Counts 55 through 66. Because the aggregate amount of gross proceeds allegedly gained in Counts 23 through 24 exceeds the total amount of money charged in the money laundering counts, the jury could have rationally reached the conclusion that the amount of clean funds in account no. HS 72449, exceeded any possible tainted funds.

In addition, the offense of money laundering requires the government to prove that the defendant knew that

the property involved in the monetary transaction constituted, or was derived from, proceeds obtained by some criminal offense. Defendant Hirko consistently testified that he engaged in the trades of Enron stock to diversify his portfolio, and not to take advantage of material non-public information. Based on the acquittal of Defendant Hirko on Counts 23 and 24, the jury could have logically come to the conclusion that Defendant Hirko did not know that the money transferred from account no. HS 72449 involved proceeds obtained by some criminal offense.

2.

Defendant Hirko next contends that "there is no question that the government relied on the same common nucleus of alleged misrepresentations and omissions to prove the securities, wire-fraud and insider-trading counts. As a result, by determining that the government failed to prove such misrepresentations and omissions in acquitting Mr. Hirko of the February and April Insider Trading Counts, the jury also necessarily determined that the government failed to prove that he engaged in such misrepresentations or omissions for purposes of the Securities and Wire Fraud Counts or the May 2001 Insider Trading Counts." (Instrument No. 26).

Over the course of the three-month long trial of the Defendants on the Fifth Superseding Indictment[3], the

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[3] The first trial on the Fifth Superseding Indictment, conducted on April 18, 2005 through July 13, 2005, included all five Defendants charged in the Fifth Superseding Indictment – Joseph Hirko, Kevin Howard, Scott Yeager, Rex Shelby, Michael Krautz. After trial, the government later severed the Defendants into three separate indictments, charging Defendants Howard and Krautz in the Sixth Superseding Indictment, charging Defendant Yeager in

government presented a theory of prosecution that Defendants all participated in a single conspiracy aimed at falsely portraying the technological capabilities, value, revenue, and business performance of Enron Broadband Services. The government argued that the objective of the conspiracy was to increase the price of Enron stock, so that the Defendants could personally enrich themselves through stock sales, salary and performance bonuses. The government first presented evidence of the problems with EBS products and services leading up to the January 2000 Analyst Conference.

Specifically, the government presented evidence of problems with the Media Cast and Media Transport products. The government also presented testimony that the Interagent software did not function as network control software, and that the Enron Intelligent Network did not possess much intelligence. The government further presented evidence that the network had significant problems with security, an inability to control routers on the network, and an inability to perform billing and quality of service operations. In addition, the government presented evidence of internal arguments between EBS employees, including Rex Shelby, David Berberian, John Griebling, John Bloomer, Joe Hirko, and Scott Yeager.

As the first component of the scheme to defraud, the government presented press releases in the latter part of 1999, and testimony that the press releases did not comport with the problems facing EBS. The

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the Seventh Superseding Indictment, and charging Defendants Shelby and Hirko in the Eighth Superseding Indictment.

government further presented evidence of statements made at the January 2000 Analyst Conference. The government argued that Defendants made false and misleading statements about the EBS fiber network, proprietary software, and technological capabilities of EBS. Specifically, the government pointed to statements claiming EBS had an advanced network control software or BOS software, and argued that each statement was false, misleading, or omitted a material fact. The government further argued that Defendants continued to issue false press releases with the purpose of driving up the stock price. Finally, the government argued that Defendants Hirko, Shelby, and Yeager sold large blocks of Enron stock, in order to take advantage of the rising stock price, which resulted from the overall scheme to defraud the investing public at the 2000 Analyst Conference and in press releases.

With respect to Defendant Hirko the government argued that Hirko failed to disclose inside information about the problems with the EIN and within EBS, at the January 2000 Analyst Conference. The government further argued that the object of Defendant Hirko's alleged participation in the scheme to defraud and failure to disclose the "truth" about EBS at the January 2000 Analyst Conference, culminated in his sale of Enron Stock when the public did not know the "truth" about EBS. After the January 2000 Analyst Conference, the government introduced evidence that Defendant Hirko attended offsite meetings in February and March 2000, in which EBS employees reported on problems with EBS products, the network, and the EIN. The government also presented evidence that on April 20, 2000, Hirko received a Coordinated Engineering Plan from Larry Ciscon which showed no timetable for the completion of any EBS software

development efforts and showed that none of the projects were concluded or released. The government further presented evidence that Hirko participated in the approval of press releases on April 11, 2000 and May 15, 2000, which allegedly contradicted known limitations of EBS' technological capabilities and progress.

Defendant Hirko summarizes his theory of defense and disputed issues on the insider trading counts as follows:

> [Mr. Hirko] did not dispute that he was an "insider" or that he knowingly exercised options and sold stock on the dates alleged by the government. Nor did he dispute that he used or caused to be used a means or instrumentality of interstate commerce. Instead, he focused on the fact that he did not engage in any of the alleged misrepresentations and omissions that formed the basis of the "insider information" that the government claimed he possessed and used.

(Instrument No. 936, at 21).

Defendant Hirko's summary of disputed issues alone gives the Court no indication of what particular issues the jury necessarily decided in acquitting Defendant Hirko of the February and April 2000 insider trading counts. First of all, insider trading does not specifically require proof of a false or misleading statement or omission of material fact, as is required to establish a charge of wire fraud and which was alleged in the securities fraud charges.[4] Rather, insider trading

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[4] For the crime of securities fraud, the making of an untrue statement or material omission of fact is ordinarily one of several acts that may satisfy the "scheme to defraud" element of securities

requires proof that the defendant used material, nonpublic information in his purchase or sale of corporate stock. Thus, the fact that Defendant Hirko received an acquittal on insider trading would not have any bearing on whether Defendant Hirko made misrepresentations and omissions of material fact at the 2000 Analyst Conference and in press releases. In sum, the Court cannot, in all practicality, determine what particular issue the jury necessarily decided in acquitting Defendant Hirko of the February and April 2000 counts of insider trading. *See Deerman*, 837 F.2d at 690 ("When a fact is not necessarily determined in a former trial, the possibility that it may have been does not prevent re-examination of that issue.").

As Defendant Hirko states in his Motion to Dismiss, "there is no clear rationale for why the jury was unable to reach a determination on the May 2000 Insider Trading Counts [as opposed to the February and April 2000 Insider Trading Counts], other than sheer exhaustion following an extended trial and contentious deliberations." (Instrument No. 936, at 27). Defendant Hirko asserts that, "it would be far more speculative to place credence in the jury's failure to reach a decision on the May 2000 Insider Trading Counts than on its unanimous decision to acquit Mr. Hirko on the February and April Insider Trading Counts." (*Id.*). However, the collateral estoppel analysis under *Ashe v. Swenson* requires the Court to determine what the jury "necessarily decided," and not what it may have decided or may have failed to decide. Thus, the Court chooses not to accept Defendant Hirko's invitation and will not

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fraud. Here, the government specifically alleged that Defendants "made false and misleading statements and omitted material information from statements made." (Instrument No. 468, at ¶ 11).

speculate any further as to what the jury may have determined in acquitting Defendant Hirko of Counts 23 and 24 of the Fifth Superseding Indictment. Accordingly, Defendant Hirko's Motion to Dismiss on Collateral Estoppel Grounds is DENIED.

IV.

The Fifth Circuit has held that "even when a subsequent prosecution is not completely barred . . . collateral estoppel may bar the admission or argumentation of *facts* necessarily decided in the first trial." *Brackett,* 113 F.3d at 1400. However, "[a] general verdict of acquittal, exculpating the defendant of liability for a substantive offense, does not estop the government from introducing the same evidence in a subsequent prosecution for conspiracy to commit the same offense." *Id.* (citing *United States v. Garza,* 754 F.2d 1202, 1209 (5th Cir. 1985)). "A general verdict of acquittal merely indicates that the government has failed to convince the jury, beyond a reasonable doubt, of at least one essential element of the substantive offense; it does not 'necessarily determine' any facts at issue in the conspiracy trial." *Id.*

When the acquittal of a substantive offense does not completely bar a subsequent prosecution for conspiracy to commit the same offense, the Fifth Circuit in *United States v. Brackett* recognized the following:

> the government may introduce evidence of an alleged criminal act, notwithstanding the fact that the defendant previously has been acquitted of the substantive offense, to prove participation in a conspiracy to commit the substantive offense. Overt acts in furtherance of a conspiracy need not be criminal; therefore, acquittal for the substantive offense does not bar the admission of

> the same evidence in a subsequent conspiracy trial. Merely because appellants were acquitted of the substantive . . . charges does not mean that the facts upon which the charges were based cannot later be used as non-criminal overt acts in furtherance of the conspiracy to commit the substantive offense.

113 F.3d at 1400 (internal quotations and citations omitted).

In *Dowling v. United States*, 493 U.S. 342 (1990), the Supreme Court held that "an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof." *Id.* at 349. Thus, the collateral estoppel doctrine "only bars relitigation of a previously rejected factual allegation where that fact is an ultimate issue in the subsequent case." *Wright*, 11 F.3d at 546. "A general verdict of acquittal does not [however] 'necessarily decide' an ultimate issue of fact but merely indicates that the evidence was not sufficient to prove every element of the offense beyond a reasonable doubt." *Brackett*, 113 F.3d at 1401; *see also id.* at 1401 n. 9 (stating that "*Dowling* calls into question the line of cases holding that collateral estoppel may bar the admission or argumentation of facts necessarily decided in the first trial, even if the subsequent prosecution is not completely barred.").

In order to prove the existence of a conspiracy to commit wire and securities fraud, the government must prove beyond a reasonable doubt that the defendant (1) made an agreement to commit the crime of wire or securities fraud; (2) knowingly and willfully joined into the agreement; and (3) one of the conspirators

committed at least one overt act. (Instrument No. 854, at 14). In this case it is unclear what the jury "necessarily determined" when it acquitted Defendant Hirko of twelve counts of money laundering and two counts of insider trading. As stated previously, Defendant Hirko has failed to meet his burden of establishing that the jury "necessarily determined" that Defendant Hirko did not engage in misrepresentations and omissions underlying the securities fraud, wire fraud, and insider trading counts.

The ultimate issue in a conspiracy case is whether Defendant Hirko knowingly participated in an agreement to commit wire and securities fraud. "The admissibility of evidence relevant to an ultimate issue is governed by Fed. R. Evid. 401, which defines 'relevant evidence' as evidence 'having any tendency' to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Brackett*, 113 F.3d at 1401-02. Defendant Hirko has not identified any specific facts that the jury necessarily decided in the first trial, which should not be introduced in a subsequent trial. However, evidence concerning the material non-public information available to Defendant Hirko, and alleged misrepresentations and omissions made at the January 2000 Analyst Conference and in press releases are certainly relevant to the charge of conspiracy to commit wire and securities fraud. Accordingly, collateral estoppel does not bar the government from introducing evidence originally offered in the first trial. The admissibility of that evidence is a purely evidentiary matter based on the relevance of that information.

V.

The government contends that Defendant Hirko's Motion to Dismiss on Collateral Estoppel Grounds is frivolous and requests that the Court make such a finding in this Order, so that the government may proceed with trial as scheduled. In *Abney v. United States,* 431 U.S. 651 (1977), the Supreme Court recognized a statutory right to pretrial interlocutory appeal of the denial of a motion to dismiss an indictment on the basis of double jeopardy. The Court emphasized that the rights conferred under the Double Jeopardy Clause "would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" because the Double Jeopardy Clause is not only a protection against twice being convicted, but is also a "guarantee against being twice put to trial for the same offense." *Id.* at 660-61. *See also United States v. Angleton,* 221 F. Supp. 2d 696, 734 (S.D. Tex. 2002). The Supreme Court noted, however, that its holding may encourage "dilatory appeals," and that such "problems of delay" may be ameliorated by expedited appeals and procedural rules. *Id.* at 662 n.8.

In *United States v. Dunbar,* 611 F.2d 985, 987 (5th Cir. 1980), the Fifth Circuit set forth procedural rules for dual jurisdiction of trial and appellate courts during interlocutory appeals from orders denying motions to dismiss based on double jeopardy. The court held that:

> Henceforth, the district courts, in any denial of a double jeopardy motion, should make written findings determining whether the motion is frivolous or non-frivolous. If the claim is frivolous, the filing of a notice of appeal by the defendant shall not divest the district court of

> jurisdiction over the case. If non-frivolous, of course, the trial cannot proceed until a determination is made of the merits of an appeal.

Id. at 988. The court further explained that "[i]f an appeal from a motion decided to be frivolous by the district court is found meritorious by the appellate court, [a] conviction in the district court would be reversed. If found not to have merit, jurisdiction for the trial which occurred during the appeal would be affirmed." *Id.* at 989.

In *United States v. Kalish*, 690 F.2d 1144 (5th Cir. 1982), the Fifth Circuit explained that "district courts must adhere to the literal meaning of the term 'frivolous,' and that [the] court [would] carefully scrutinize . . . findings of frivolousness." *Id.* at 1154 (stating that "[t]he whole purpose of *Abney* is defeated when district courts proceed to trial because they do not believe the defendant's double jeopardy plea is sufficiently meritorious to warrant a stay"). The court further noted that *Dunbar* was intended to prevent *dilatory* claims, not *colorable* ones. *Id.* (emphasis added). *See also Richardson v. United States*, 468 U.S. 317, 326 n.6 (1984) (stating that "[a] colorable claim, of course, presupposes that there is *some possible validity* to a claim") (emphasis added).

In *United States v. Angleton*, 221 F. Supp. 2d 696 (S.D. Tex. 2002), the Court found that "double jeopardy claims are not frivolous when the claim is complicated or raises legal issues not clearly foreclosed by binding precedent, even if the claim is rejected on the merits." *Id.* at 736. *See e.g., United States v. Kress*, 58 F.3d 370 (8th Cir. 1995) (finding double jeopardy claim not frivolous considering the depth of the district court's

analysis, notwithstanding that the Eighth Circuit found the claim unsuccessful); *United States v. McHan*, 966 F.2d 134 (4th Cir. 1992) (finding double jeopardy claim not frivolous where determination of whether indictments charged same offense required a complex analysis); *c.f. United States v. LaMere*, 951 F.2d 1106 (9th Cir. 1991) (finding that purely legal claims are frivolous when the outcome is "clear" upon "long-standing case law" binding in that circuit).

In this case, Defendant Hirko argues that his acquittal of several counts of the indictment precludes the government from re-trying him on the deadlocked counts of the indictment. Specifically, Defendant Hirko argues that the unifying theory of the government's prosecution and the overlapping elements and methods of proof on the acquitted and hung counts show that the jury necessarily decided that the government failed to prove Defendant Hirko engaged in the common misrepresentations and omissions underlying the securities fraud, wire fraud, and insider trading charges. As stated previously, however, the Court finds that Defendant Hirko has failed to meet his burden of demonstrating that the jury or the Court "necessarily decided" any ultimate issue in the first trial. Although the Court finds that Defendant Hirko's collateral estoppel argument lacks merit, the Court finds that Defendant Hirko made a good faith colorable claim of collateral estoppel, rather than a dilatory or frivolous claim with no arguable basis in fact or law.

Defendant Hirko's collateral estoppel argument required a fact-intensive analysis of the indictment, testimony, court's instructions to the jury, and jury's verdict. This case involved a lengthy multiple-count indictment with charges that alleged similar conduct, similar offenses, similar time frames, and a similar

motive and intent to defraud. Thus, the fact-intensive collateral estoppel analysis required in this case, after Defendant received acquittals on several counts, greatly differs from a purely legal analysis involving dissimilar charges or dual sovereignty issues with clearly defined legal precedent. In addition, Defendant Hirko filed the present motion in a timely manner, several months prior to the scheduled trial date, indicating a good faith argument for dismissal, rather than a dilatory attempt to delay trial. Accordingly, the Court finds that Defendant Hirko's Motion to Dismiss on Collateral Estoppel Grounds is non-frivolous.

VI.

IT IS HEREBY ORDERED that Defendant Joseph Hirko's Motion to Dismiss Counts 2 through 6, 25 and 26 of the Fifth Superseding Indictment and Counts 2 through 6 of the Seventh Superseding Indictment on Grounds of Collateral Estoppel **(Instrument No. 935)** is **DENIED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 31st day of August, 2006, at Houston, Texas.

/s/
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-20321

[FILED:
Apr 14, 2008]

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

SCOTT YEAGER
Defendant - Appellant

Consolidated with
Case No. 06-20593

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

REX SHELBY
Defendant - Appellant

Consolidated with
Case No. 06-20691

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

JOSEPH HIRKO
Defendant - Appellant

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITIONS FOR REHEARING EN BANC

(Opinion March 17, 2008, 5 Cir., ___, ___ F.3d ___)

Before HIGGINBOTHAM, GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearings En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

( ) Treating the Petitions for Rehearing En Banc as a Petitions for Panel Rehearing, the Petitions for Panel Rehearing are DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petitions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FORTUNATO P. BENAVIDES
United States Circuit Judge

REHG-6a

OCT 15 2008

Nos. 08-40, 08-58 and 08-67

In the Supreme Court of the United States

JOSEPH HIRKO, PETITIONER

v.

UNITED STATES OF AMERICA

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

F. SCOTT YEAGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's verdict that petitioners were not guilty on some counts bars the government from retrying petitioners on other counts on which the jury was unable to reach a verdict.

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In the Supreme Court of the United States

No. 08-40
JOSEPH HIRKO, PETITIONER
v.
UNITED STATES OF AMERICA

No. 08-58
REX SHELBY, PETITIONER
v.
UNITED STATES OF AMERICA

No. 08-67
F. SCOTT YEAGER, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 521 F.3d 367.[1] The opinion of the district

[1] Unless otherwise noted, all references to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 08-40.

court denying petitioner Hirko's motion to dismiss (Pet. App. 29a-59a) is reported at 447 F. Supp. 2d 734. The opinion of the district court denying petitioner Shelby's motion to dismiss (08-58 Pet. App. 29a-60a) is reported at 447 F. Supp. 2d 750. The opinion of the district court denying petitioner Yeager's motion to dismiss (08-67 Pet. App. 29a-66a) is reported at 446 F. Supp. 2d 719.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2008. A petition for rehearing was denied on April 14, 2008 (Pet. App. 60a-61a). The petition for a writ of certiorari in No. 08-40 was filed on July 8, 2008, and the petitions for a writ of certiorari in Nos. 08-58 and 08-67 were filed on July 14, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2005, a grand jury sitting in the Southern District of Texas returned a seventh superseding indictment against petitioners Hirko and Shelby and an eighth superseding indictment against petitioner Yeager. Hirko was charged with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. 2002), and 17 C.F.R. 240.10b-5; two counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002); and five counts of insider trading, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5. Seventh Superseding Indictment paras. 23-29, 34-35. Shelby was charged with conspiracy to commit wire fraud and securities fraud, securities fraud, and four counts of insider trading. *Id.* paras. 23-27, 32-33. Yea-

ger was charged with five counts of insider trading and eight counts of money laundering in violation of 18 U.S.C. 1957 (2000). Eighth Superseding Indictment paras. 26-29. Petitioners moved to dismiss the bulk of those charges on the ground that the collateral estoppel component of the Fifth Amendment's Double Jeopardy Clause barred their prosecution. See Pet. App. 5a. The district court denied petitioners' motions. *Id.* at 29a-59a (Hirko); 08-58 Pet. App. 29a-60a (Shelby); 08-67 Pet. App. 29a-66a (Yeager). The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioners were executives at Enron Broadband Services (EBS), a unit of Enron Corporation engaged in the telecommunications business. In late 1998, EBS sought to develop an advanced "intelligent" communications network and the software necessary to run the network. According to the indictments, petitioners purposely sought to deceive the public and to drive up the price of Enron stock by making false statements about EBS's progress and financial condition. At the same time, the indictments allege, petitioners enriched themselves by selling millions of dollars of Enron stock. The indictments charge that petitioners made the false claims in press releases between 1999 and 2000 and at Enron's annual analyst conference in January 2000. Pet. App. 3a-4a; Gov't C.A. Br. 5-12.

2. In November 2004, a fifth superseding indictment charged petitioners with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371 (2000) (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5 (Count 2); and four counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002) (Counts 3-6). In addition, each peti-

tioner was charged with insider trading under 15 U.S.C. 78j(b) (2000), 15 U.S.C. 78ff (2000 & Supp. II 2002), and 17 C.F.R. 240.10b-5: Hirko was charged with seven counts (Counts 23-26, 172-174), Shelby was charged with eight counts (Counts 47-54), and Yeager was charged with 20 counts (Counts 27-46). Each petitioner was also charged with money laundering under 18 U.S.C. 1957 (2000): Hirko was charged with 14 counts (Counts 55-66, 175-176), Shelby was charged with six counts (Counts 166-171), and Yeager was charged with 99 counts (Counts 67-165). Pet. App. 3a n.2; Gov't C.A. Br. 2-3.

After a trial in the United States District Court for the Southern District of Texas, the jury found petitioners not guilty on some counts but was unable to reach a verdict on the remaining counts. The jury found Hirko not guilty on two counts of insider trading (Counts 23-24) and 12 counts of money laundering (Counts 55-66). The jury found Shelby not guilty on four counts of insider trading (Counts 51-54). And the jury found Yeager not guilty on the conspiracy count (Count 1), the securities fraud count (Count 2), and the four counts of wire fraud (Counts 3-6). The jury was unable to reach a verdict on the other counts. The district court granted judgments of acquittal for Shelby on the four wire fraud counts (Counts 3-6) and on the six money laundering counts (Counts 166-171). The court declared a mistrial on the remaining counts. Pet. App. 4a; Gov't C.A. Br. 3-4.

3. Subsequently, in November 2005, the grand jury returned the seventh and eighth superseding indictments, which essentially deleted the counts on which petitioners were acquitted and re-alleged some, but not all, of the counts on which the jury had deadlocked. The first two counts of the seventh superseding indictment

charged Hirko and Shelby with conspiracy to commit wire and securities fraud as well as securities fraud, and those counts rested on essentially the same facts as Counts 1 and 2 of the fifth superseding indictment. The seventh superseding indictment also re-alleged against Hirko two of the wire fraud counts and five of the insider trading counts that had been charged in the fifth superseding indictment, and it charged Shelby with four insider trading counts that had been alleged in the fifth superseding indictment. Neither Hirko nor Shelby was charged with any money laundering counts. The eighth superseding indictment charged Yeager with five counts of insider trading and eight counts of money laundering, all of which had been alleged in the fifth superseding indictment. Pet. App. 4a-5a; Gov't C.A. Br. 4, 11-12.

4. Petitioners Hirko and Shelby moved to dismiss some of the counts charged in the seventh superseding indictment, and petitioner Yeager moved to dismiss all of the counts charged in the eighth superseding indictment. Petitioners claimed that the collateral estoppel component of the Double Jeopardy Clause barred further prosecution on those counts because, according to petitioners, facts essential to conviction on the counts had been resolved in their favor by the acquittals at the prior trial. The district court denied the motions. Pet. App. 4a-5a, 29a-59a; 08-58 Pet. App. 29a-60a; 08-67 Pet. App. 29a-66a.

a. Hirko moved to dismiss the securities fraud count, the two wire fraud counts, and two of the insider trading counts. Pet. App. 5a, 31a-34a.[2] He argued that the jury

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[2] The two insider trading counts that Hirko moved to dismiss involved transactions that occurred in 2000. Hirko did not move to dismiss three other insider trading counts that involved transactions that

at the prior trial had necessarily found that he did not engage in the misrepresentations that formed the factual basis of those counts when it found him not guilty of the 12 money laundering and two other insider trading counts. *Id.* at 44a-45a; Gov't C.A. Br. 17.

The district court denied Hirko's motion. Pet. App. 29a-59a. The court concluded that the prior acquittals on the money laundering counts had no preclusive effect because, "[u]nder the circumstances of this case, the jury could have acquitted [Hirko] for any number of reasons," including that the funds that he allegedly laundered "were derived from the sale of stock that did not involve the proceeds of criminal activity." *Id.* at 45a. The court concluded that the prior acquittals on the insider trading counts likewise had no preclusive effect because the court could not determine "what particular issues the jury necessarily decided" when it found Hirko not guilty of those charges. *Id.* at 51a.

b. Shelby moved to dismiss the securities fraud count and the four insider trading counts. 08-58 Pet. App. 4a-5a, 31a-34a.[3] He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily decided that he did not act with the requisite intent to defraud when it found him not guilty on four other insider trading counts. *Id.* at 34a-35a, 43a.

The district court denied Shelby's motion. 08-58 Pet. App. 29a-60a. The court concluded that "the record contain[ed] no clear indication" that the jury's acquittals on

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occurred in 2001. Hirko also did not move to dismiss the conspiracy count. Pet. App. 5a, 33a-34a.

[3] Like Hirko, Shelby did not move to dismiss the conspiracy count. 08-58 Pet. App. 4a-5a, 34a.

the insider trading counts at the prior trial were "based on a finding that [Shelby] lacked knowledge or an intent to defraud." *Id.* at 49a. "Rather," the court explained, "the jury could have found that the government failed to prove beyond a reasonable doubt that [Shelby] actually used material non-public information that he had in his possession at the time that he made [the] trades [involved in those counts], or that the government failed to establish that [he] employed or devised a scheme to defraud during that time period." *Ibid.* The court observed that the government's evidence that Shelby had acquired material, nonpublic information at the time he made the stock sales was stronger for the counts on which the jury had hung than for the counts on which it had found Shelby not guilty. *Id.* at 49-50a.

c. Yeager moved to dismiss the five insider trading counts and the eight money laundering counts. 08-67 Pet. App. 5a, 31a-36a. He argued that those counts were barred by collateral estoppel because the jury at the prior trial had necessarily found that he did not use material, nonpublic information in his sales of Enron stock when it found him not guilty on the conspiracy count, the securities fraud count, and the four wire fraud counts. *Id.* at 39a-40a, 49a-50a.

The district court denied Yeager's motion. 08-67 Pet. App. 29a-66a. The court concluded that the jury's not-guilty verdicts at the prior trial "necessarily determined that [Yeager] did not knowingly and wilfully participate or agree to participate in a scheme to defraud in connection with the alleged false statements or material omissions made at the analyst conference and press releases." *Id.* at 59a. The court stressed, however, that this determination did not "negate the government's evidence and contention that Yeager possessed and used

material nonpublic information at the time he made trades of Enron stock." *Ibid.* Because the government was not required to prove Yeager's participation in the scheme to defraud in order to establish his guilt on the insider trading counts, the court ruled that the prior acquittals did not collaterally estop the government from retrying Yeager on the insider trading and money laundering counts. *Id.* at 58a-59a, 62a.

5. The court of appeals affirmed. The court held that, on the facts of this case, the acquittals at the prior trial did not collaterally estop the government from retrying petitioners on any of the counts on which the jury was unable to reach a verdict. Pet. App. 1a-28a.

a. The court of appeals first concluded that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, had necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. Pet. App. 8a-13a. The court observed that the four insider trading acquittals at the prior trial involved sales of Enron stock during the summer of 2000, while the four insider trading counts on which the jury hung involved sales between January and March 2000. *Id.* at 8a. After an "extensive" examination of the record, *id.* at 9a, the court found that the acquittals could have been based on the jury's determination that Shelby "did not 'use' undisclosed, material information when he made the sales" during the summer of 2000 but instead made those sales because of discomfort with the stock market. *Ibid.* That determination, the court explained, would not bar a retrial on the insider trading counts involving sales between January and March, because it would not preclude a finding that Shelby made *those* trades because he possessed insider information. *Id.* at 9a-11a.

The court also concluded that the four insider trading acquittals did not bar a retrial on the securities fraud count because "'[u]sing' insider information in making trades is not an element of securities fraud." *Id.* at 12a.

b. The court concluded that Hirko likewise failed to show that the jury, in acquitting him on the 12 money laundering counts and two insider trading counts, necessarily made a factual determination that would bar a retrial on the securities fraud count, the two wire fraud counts and the other five insider trading counts. Pet. App. 15a-18a. The court rejected Hirko's argument that the jury must have found that he did not commit the latter offenses because they were the predicate offenses for the 12 money laundering counts on which the jury acquitted. *Ibid.* The court observed that the jury was instructed that it could find Hirko guilty of money laundering only if the government proved that he engaged in transactions with funds "derived from a specified unlawful activity," and the instructions defined "specified unlawful activity" as "wire fraud" and "fraud in the sale of securities" (including insider trading). *Id.* at 17a & n.17. The court concluded that, based on those instructions, the jury could have acquitted Hirko on the money laundering counts because it was unable to decide whether the government had proved that he had committed securities fraud, wire fraud, and insider trading. *Id.* at 17a-18a.

c. Finally, the court concluded that Yeager failed to show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar a retrial on the five insider trading counts and eight money laundering counts. Pet. App. 18a-28a. Based on its review of the record, the court initially con-

cluded that "the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the [2000 annual analyst] conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 21a. "Under either rationale," the court reasoned, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." *Ibid.* The court observed that, if one considered the acquittals in isolation, it would appear that the jury "made a finding that precludes the Government from now prosecuting him on insider trading and money laundering." *Id.* at 22a.

The court concluded, however, that its precedent required it also to consider the hung counts, along with the acquitted counts, in examining what the jury actually determined. Pet. App. 22a-24a (citing *United States* v. *Larkin*, 605 F.2d 1360, 1370 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S. 939 (1980)). The court observed that, "if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 24a. Because it did not, the jury's action produced a "discrepancy." *Ibid.* The court believed that there were at least four possible explanations for that discrepancy but that it was "impossible" to determine which was the actual explanation. *Id.* at 25a. For that reason, the court concluded that Yeager could not carry his burden to show what the jury necessarily determined and thus collateral estoppel did not bar a retrial. *Ibid.*

The court expressly rejected the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never applies when a jury has found a defendant not guilty on some counts but the jury has hung on other counts at the same trial. Pet. App. 25a-28a. The court agreed with decisions of other circuits that had rejected that argument. *Id.* at 26a-27a. The court stated, however, that it parted ways with those circuits to the extent that "they ignored the mistried counts after they determined that *Powell* did not apply." *Id.* at 27a.

ARGUMENT

Petitioners contend (08-40 Pet. 13-28; 08-58 Pet. 8-25; 08-67 Pet. 9-21) that collateral estoppel bars a retrial on the counts on which the jury was unable to reach a verdict at their first trial. They further contend (08-40 Pet. 16-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the circuits are in conflict on whether a court may consider the jury's failure to reach a verdict on one count in determining the basis for a jury's acquittal on another count. The court of appeals correctly concluded that collateral estoppel does not bar retrial of petitioners on the counts on which the jury hung at petitioners' first trial. Although there is tension among the decisions of the courts of appeals on the proper application of the doctrine of collateral estoppel in the context of a mixed verdict, this Court's review is not warranted in this case.

1. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause of the Fifth Amendment "embodie[s]" the doctrine of collateral estoppel, or issue preclusion, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an

earlier prosecution. *Id.* at 445; see *Schiro* v. *Farley*, 510 U.S. 222, 232 (1994). A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge (*i.e.*, a fact that the government must prove beyond a reasonable doubt). See *Ashe*, 397 U.S. at 443-445; *Dowling* v. *United States*, 493 U.S. 342, 347-348, 350-352 (1990). The defendant bears the burden of identifying the factual issue necessarily decided at the first trial that precludes a second trial. *Id.* at 350-351; see *Schiro*, 510 U.S. at 233.

a. In the government's view, the doctrine of collateral estoppel should never bar the government from retrying a defendant on a count on which a jury was unable to reach a verdict when the same jury acquitted him on another count. See Gov't C.A. Br. 21-32. There are two reasons for that conclusion.

First, this Court has held that a "retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson* v. *United States*, 468 U.S. 317, 324 (1984). As the Court explained in *Richardson*, "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy," *id.* at 325, but "a mistrial following a hung jury is not an event that terminates the original jeopardy," *id.* at 326. It thus follows that, as this Court has observed in a slightly different context, "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio* v. *Johnson*, 467 U.S. 493, 500 n.9 (1984). In the mixed verdict con-

text, the government is forced to retry some charges only because they were not resolved by the jury when all the charges were pursued together. Accordingly, there is no reason to preclude the retrial.

Second, the rationale behind collateral estoppel does not apply when a jury renders a mixed verdict of acquittal on some counts and hangs on others at the same trial. That kind of mixed verdict has only two explanations, neither which supports application of collateral estoppel.

The jury may have found that the government failed to prove a fact that, although essential for conviction on the count on which the defendant was acquitted, was not essential for conviction on the count on which the jury deadlocked. Collateral estoppel would not be applicable in that context because an acquittal on one charge collaterally estops the government from prosecuting another charge only if the jury, in finding the defendant not guilty, necessarily decided some fact that the government must prove beyond a reasonable doubt in order to convict on the second charge. See *Ashe*, 397 U.S. at 443-445; *Dowling*, 493 U.S. at 347-348, 350-352.

Alternatively, the jury may have found that the government failed to prove a fact that was essential for conviction on both counts. Collateral estoppel would not be applicable in that circumstance because the jury's failure to acquit on the hung count would be inconsistent with its acquittal on the other count. This Court has recognized that "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful" when a jury's verdicts are inconsistent. *United States* v. *Powell*, 469 U.S. 57, 68 (1984); see *Standefer* v. *United States*, 447 U.S. 10, 23 n.17 (1980) (inconsistency in jury verdicts "is reason, in

itself, for not giving preclusive effect to the acquittals"). When a jury has reached inconsistent verdicts, a defendant has no right to argue that the verdict of acquittal was "the one the jury 'really meant.'" *Powell*, 469 U.S. at 68. The same is true when the jury inconsistently acquits on one count and hangs on another. In that case, the presumption of rationality that underlies the doctrine of collateral estoppel does not apply.

b. Although the court of appeals rejected the argument that the doctrine of collateral estoppel should never bar a retrial of a defendant on a hung count based on an acquittal on another count by the same jury, Pet. App. 25a-27a, the court correctly concluded that collateral estoppel did not bar a retrial on the hung counts in this case.[4]

Contrary to petitioners' claims (08-40 Pet. 14-15, 24-28; 08-58 Pet. 16-18, 23-25; 08-67 Pet. 13, 19-21), assuming that collateral estoppel can ever apply in this context, the court of appeals was correct to consider the counts on which the jury deadlocked as well as the counts on which the jury acquitted in ascertaining what facts the jury necessarily found in petitioners' favor.[5] As

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[4] Petitioners Hirko (08-40 Pet. 22-23) and Yeager (08-67 Pet. 19) contend that the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases. That may be true. Nevertheless, the court of appeals expressly rejected a categorical rule and left open the possibility that collateral estoppel may apply in mixed verdict cases. Accordingly, it would be premature to conclude that the Fifth Circuit has adopted a categorical rule barring the application of collateral estoppel.

[5] The court of appeals explicitly applied that analysis only to petitioner Yeager's collateral estoppel claim. Pet. App. 22a-25a. The government agrees with petitioner Hirko (08-40 Pet. 2, 11, 14-15) that the

this Court explained in *Ashe*, to determine whether a defendant's prosecution is barred by the collateral estoppel component of the Double Jeopardy Clause, a court must "examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." 397 U.S. at 444 (citation omitted). The court's "inquiry must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ibid.* (internal quotation marks and citation omitted). A jury's failure to reach a verdict on certain counts, while acquitting the defendant on other counts, is among the "relevant matter" that a court may con-

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court's decision is most reasonably read to apply the same analysis to his collateral estoppel claim.

Contrary to petitioner Shelby's contention (08-58 Pet. 16-18), the court of appeals did not apply the same analysis in rejecting his collateral estoppel claim. Rather, the court held that Shelby failed to show that the jury, in finding him not guilty on four insider trading counts, necessarily made a factual determination in his favor that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 8a-14a. After an "extensive examination of the record," the court concluded that the acquittals were based on a finding of fact on an element that the government was not required to prove with respect to the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. *Id.* at 9a-12a. Thus, Shelby's collateral estoppel claim amounts to a fact-bound dispute about whether the court of appeals properly read the record in this case. See 08-58 Pet. 23-25. That claim does not warrant this Court's review.

sider in determining what facts the jury necessarily found in the defendant's favor.[6]

There is no merit in petitioners Hirko and Shelby's claim that consideration of hung counts "turn[s] the protective function of the Double Jeopardy Clause on its head" by encouraging prosecutors to "overcharge" a case. 08-40 Pet. 26; see 08-58 Pet. 18-20. As this Court explained in *Schiro*, the Double Jeopardy Clause's protections against a second prosecution following an acquittal or conviction "stem from the underlying premise that a defendant should not be twice tried or punished for the same offense." 510 U.S. at 229. The Double Jeopardy Clause is thus not designed to limit the number of charges that prosecutors bring. Instead, its primary purpose is to "guard[] against * * * successive prosecutions." *Id.* at 230; see *Johnson*, 467 U.S. at 498-499. A retrial on a hung count is not a "successive" prosecution because, unlike a verdict of conviction or acquittal, "a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which [a defendant] was subjected." *Richardson*, 468 U.S. at 326; see *Green* v. *United States*,

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[6] Petitioner Shelby (08-58 Pet. 15) erroneously contends that the court of appeals' consideration of the hung counts conflicts with this Court's decision in *Schiro*, a capital case in which the defendant argued that the jury's failure to return a verdict on one count had collateral estoppel effect at the sentencing hearing. 510 U.S. at 232-236. In *Schiro*, the jury returned a verdict finding the defendant guilty on one out of three counts of murder, *id.* at 225-226, but the jury was not instructed to return verdicts on all of the counts. *Id.* at 233. "[S]ince it was not clear to the jury that it needed to consider each count independently," the Court declined to "draw any particular conclusion from its failure to return a verdict on Count I." *Id.* at 234. *Schiro* thus does not address the relevance to collateral estoppel analysis of a jury's inability to reach a verdict on a count that it was required to consider.

355 U.S. 184, 187-188 (1957). Indeed, giving collateral estoppel effect to a jury's acquittal on one count to bar a retrial on a hung count would undermine "society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Richardson*, 468 U.S. at 324 (quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see *Wade* v. *Hunter*, 336 U.S. 684, 688-689 (1949).

The Fifth Circuit's analysis in this case is similar to the approaches taken by the First, Eighth, and District of Columbia Circuits. See *United States* v. *Howe*, 538 F.3d 820, 827-829 (8th Cir. 2008); *United States* v. *Aguilar-Aranceta*, 957 F.2d 18, 24-25 (1st Cir.), cert. denied, 506 U.S. 834 (1992); *United States* v. *White*, 936 F.2d 1326, 1328-1329 (D.C. Cir.), cert. denied, 502 U.S. 942 (1991). In each of those cases, the defendant was charged with multiple counts that involved a common issue. The jury acquitted the defendant on one count and deadlocked on another count. The court of appeals, taking into account both the jury's verdict of acquittal on one count and the jury's failure to reach a verdict on the other count, declined to hold that the verdict of acquittal rested on a finding in the defendant's favor on the common issue. The court instead reasoned that the verdict of acquittal could more rationally be explained as resting on the jury's finding on an issue that was not common to both counts. *Howe*, 538 F.3d at 828-829; *Aguilar-Aranceta*, 957 F.2d at 24-25; *White*, 936 F.2d at 1329. The court below followed essentially the same approach here.

2. Petitioners contend (08-40 Pet. 16-19, 22-23; 08-58 Pet. 12-16; 08-67 Pet. 12-17) that the decision below conflicts with decisions of the Sixth, Seventh, Ninth and Eleventh Circuits. Although there is tension between

the decisions of those circuits and the decision of the court of appeals in this case, this Court's review is not warranted at this time.

In *United States* v. *Frazier*, 880 F.2d 878, 885-886 (1989), cert. denied, 493 U.S. 1083 (1990), the Sixth Circuit applied collateral estoppel to bar retrial on a hung count based on a simultaneous acquittal on another count. The court rejected the government's argument that a jury's simultaneous acquittal and failure to reach a verdict amounted to the kind of inconsistency that would trigger the *Powell* rule that no factual finding in the defendant's favor can be deduced from inconsistent verdicts. *Id.* at 882-883.

In *United States* v. *Bailin*, 977 F.2d 270 (1992), the Seventh Circuit reached a similar result in a slightly different context. In that case, the jury was unable to reach a verdict on counts charging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, but it acquitted the defendant on other counts charging offenses that were also among the predicate acts in the RICO counts. The Seventh Circuit held that, although the government could retry the defendant on the RICO counts, the government could not base the RICO counts on predicate acts of which the defendant had been acquitted. *Bailin*, 977 F.2d at 275-283. In so holding, the court declined to apply the *Powell* rule, finding that "the jury's failure to reach a verdict [was] too inconclusive to qualify as inconsistent [with the acquittals] for the purposes of issue preclusion." *Id.* at 280 (internal quotation marks and citation omitted).

In *United States* v. *Romeo*, 114 F.3d 141 (1997), the Ninth Circuit held that the defendant's acquittal on a drug possession count barred his retrial on a drug im-

portation count on which the jury failed to reach a verdict. The court concluded that "a rational jury could [not] have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," *i.e.*, that the defendant did not know that marijuana was in the trunk of the car that he drove from Mexico to the United States. *Id.* at 143 (citation omitted). The court declined to apply the *Powell* rule, observing that "[t]he inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not on why the jury could not agree on the deadlocked count." *Id.* at 144.

There is tension between the decisions in *Frazier*, *Bailin*, and *Romeo* and the court of appeals' decision in this case, but there is no conflict. None of those decisions holds that a jury's failure to reach a verdict on one count is *always* irrelevant in determining what facts the jury necessarily found in acquitting the defendant on another count. Rather, those decisions merely found that, on the particular facts of those cases, the defendants had made out their collateral estoppel claims. Moreover, the court of appeals in this case made clear that it was *not* holding that the doctrine of collateral estoppel could *never* be applied to bar a retrial in the mixed verdict context. Pet. App. 25a-28a.[7]

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[7] Petitioners Hirko (08-40 Pet. 23) and Yeager (08-67 Pet. 13) also rely on *United States* v. *Mespoulede*, 597 F.2d 329 (2d Cir. 1979). That case is inapposite, however, because it involved the application of collateral estoppel to bar the admission of evidence at a retrial, rather than to bar the retrial itself. Moreover, *Mespoulede* has been effectively overruled by this Court's decision in *Dowling*, which held that collateral estoppel does not bar the admission of evidence of a fact resolved in a defendant's favor at the first trial, provided that the government is not seeking to prove that fact beyond a reasonable doubt at the second trial.

More recently, the Eleventh Circuit held in *United States* v. *Ohayon*, 483 F.3d 1281, 1288-1291 (2008), that a jury's failure to reach a verdict on a hung count is not relevant to the determination whether the defendant has made out a collateral estoppel claim based on an acquittal on another count. The court held that the jury's acquittal on a charge of attempt to possess ecstasy with the intent to distribute it collaterally estopped the government from retrying the defendant on a charge of drug conspiracy, because the jury necessarily found that the defendant did not know that drugs were in the bag he received from a confidential informant. *Id.* at 1286-1287. In rejecting the government's argument that the partial mixed verdict showed that jury did not acquit on that basis, the court stated that "[a] partial verdict does not comprise two decisions that we must try to reconcile, because the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis." *Id.* at 1289.

Although *Ohayon* appears to conflict with the decision in this case, this Court's review to resolve that apparent conflict would be premature at this time. It is possible that the Eleventh Circuit might reconsider its decision in *Ohayon* in light of the decision in this case. In *Ohayon*, the Eleventh Circuit declined to follow circuit precedent that is consistent with the decision in this case because the court concluded that the precedent was inconsistent with an earlier precedent, *United States* v. *Larkin*, 605 F.3d 1360 (5th Cir. 1979), modified on other grounds, 611 F.2d 585 (5th Cir.), cert. denied, 446 U.S.

Compare *Dowling*, 493 U.S. at 347-350, with *Mespoulede*, 597 F.2d at 334-335.

939 (1980).[8] See *Ohayon*, 483 F.3d at 1288-1289 (declining to follow *United States* v. *Quintero*, 165 F.3d 831 (11th Cir.), cert. denied, 528 U.S. 963 (1999), and *United States* v. *Bennett*, 836 F.2d 1314 (11th Cir.), cert. denied, 487 U.S. 1205 (1988)). But the Fifth Circuit's decision in this case makes clear that the Eleventh Circuit misread *Larkin*. As the court below explained, *Larkin* actually requires that a hung count be taken into account in determining the collateral estoppel effect of an acquittal. Pet. App. 23a-24a; see *Larkin*, 65[illegible] F.2d at 1370 ("No rational jury could have absolved Larkin of liability for Parker's crimes [on the vicarious liability counts] because of the absence of a conspiracy between the two, while it simultaneously failed to acquit Larkin on the conspiracy charge itself."). Accordingly, the Eleventh Circuit may be willing to re-examine its decision in *Ohayon* in an appropriate future case.[9]

3. a. This Court's review is also unwarranted at this time because the question presented arises relatively infrequently. We are aware of only two occasions other than this one in the last 20 years in which this Court has been asked to resolve the tension among the courts of appeals on the issue. The Court denied review in both of those cases. See *Quintero* v. *United States*, 528 U.S. 963 (1999) (No. 99-39); *White* v. *United States*, 502 U.S. 942

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[8] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit rendered before October 1, 1981.

[9] As petitioner Hirko notes (08-40 Pet. 23-24), the government filed a petition for rehearing en banc in *Ohayon*. The Eleventh Circuit's issuance of its decision on April 12, 2007, and denial of the government's petition on August 7, 2007, occurred before the court of appeals decided this case on March 17, 2008.

(1991) (No. 91-516). The Court should do the same here.[10]

b. Indeed, review would be particularly inappropriate in this case because collateral estoppel would not bar petitioners' retrials even if petitioners were correct that the hung counts could not be considered. Even if only the acquittals are considered, none of the petitioners can show that the jury necessarily found a fact in his favor that is an essential element of the counts on which the jury deadlocked.

Contrary to petitioner Hirko's claim (08-40 Pet. 4-7), he cannot show that the jury's acquittals on the 12 money laundering counts necessarily rested on a finding that he did not commit the predicate acts alleged in the securities fraud count, two wire fraud counts, and two insider trading counts on which the jury deadlocked. As the government argued in the court of appeals, the indictment and jury instructions could rationally have led the jury to believe that it had to convict Hirko on *all* of the predicate securities, wire fraud, and insider trading counts in order to convict him on the money laundering counts. The indictment and the jury instructions both defined "specified unlawful activity" for purposes of the money laundering charges as "wire fraud * * * *and* fraud in the sale of securities." Fifth Superseding Indictment para. 52; Pet. App. 17a n.17 (emphasis added). And neither the court nor the parties ever

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[10] The issue has also arisen in a few other cases in which the petitioner did not raise a conflict claim. See, *e.g.*, *Aguilar-Aranceta* v. *United States*, 506 U.S. 834 (1992) (No. 91-7995); *Ashley Transfer & Storage Co.* v. *United States*, 490 U.S. 1035 (1989) (No. 88-1305); *Campbell* v. *United States*, 488 U.S. 993 (1988) (No. 88-479); *Bennett* v. *United States*, 487 U.S. 1205 (1988) (No. 87-1751). The Court denied review in those cases as well.

expressly explained to the jury that the funds that Hirko was alleged to have laundered need not be derived from *both* of those offenses. Accordingly, the jury may have felt compelled to acquit Hirko on the money laundering counts once it decided to acquit him on two of the predicate insider trading counts that generated some of the funds that he allegedly laundered. See Gov't C.A. Br. 44-50.

Similarly, Shelby cannot show that the jury, in acquitting him on four insider trading counts, necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. See Pet. App. 7a-14a; Gov't C.A. Br. 38-43. Indeed, as discussed above, the court of appeals held that a retrial on the hung counts was not barred because the jury's acquittals were based on a finding of fact on an element that the government was not required to prove to establish Shelby's guilt on the hung counts, *i.e.*, that Shelby did not use insider information when he sold Enron stock in the summer of 2000. Pet. App. 9a-12a; see note 6, *supra*.

Finally, Yeager cannot show that the jury, in acquitting him on the conspiracy count, the securities fraud count, and the four wire fraud counts, necessarily made a factual determination that would bar his retrial on the five insider trading counts and eight money laundering counts. Although the court of appeals believed that "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information," Pet. App. 21a, the record does not support that conclusion. Instead, as the government argued in the court of appeals, the jury's acquittals on the conspiracy and fraud counts could have rested on the conclusion that Yeager did not participate in the failure to disclose the

true state of EBS's business or that he lacked the requisite intent to defraud when those misrepresentations or omissions occurred. Those conclusions would not preclude a finding that Yeager possessed insider information and used it to trade in Enron stock. See Gov't C.A. Br. 32-38. Indeed, as the district court found, Yeager "did not deny proof of his possession of material, nonpublic information." 08-67 Pet. App. 58a. Thus, the jury's acquittals do not bar a retrial on the five insider trading counts and eight money laundering counts on which the jury deadlocked.

Because petitioners cannot show that the jury necessarily found facts in their favor that would bar a retrial on the hung counts even if only the acquittals are considered, petitioners' claims involve only fact-bound applications of the doctrine of collateral estoppel. Further review of those claims by this Court is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Solicitor General has filed a "Brief in Opposition," but it more accurately resembles a grudging acquiescence. The government concedes that the primary question presented – whether a court may refuse to give collateral estoppel effect to an acquittal under *Ashe* v. *Swenson*, 397 U.S. 436 (1970), solely because the jury also hung on one or more factually related counts – has divided the circuits. And the government does not dispute that the Fifth Circuit's rule renders the constitutional protections of *Ashe* categorically inapplicable to partial-verdict cases, or that Hirko's case squarely presents this issue.

Nonetheless, the government suggests that review is unnecessary "at this time." Br. in Opp. 21. First, the government attempts to downplay the extent of the conflict by claiming that the Eleventh Circuit may "reconsider" its conflicting decision and that decisions by other circuits are in mere "tension" with the rule adopted below. But neither assertion has the slightest foundation; indeed, both the decision below and the Eleventh Circuit have expressly acknowledged this stark and widespread conflict. Second, the government claims that the issue does not arise with sufficient "frequency" to merit further review. But that was not the government's view when it urged the Eleventh Circuit to consider this question of "exceptional importance" *en banc* just last year. The government also asserts that Hirko cannot demonstrate that the jury necessarily decided a fact in his favor that would preclude retrial. But the government merely recycles factbound arguments that failed to persuade even the court below and are no obstacle to this Court's review.

When all is said and done, the government's brief is devoted largely to defending the result reached below (but, notably, not the Fifth Circuit's reasoning). As we briefly explain, the government's theory fares no better than that adopted by the court below. In any

event, the government's opposition should be viewed for what it is: a prelude to the full consideration on the merits that this question plainly warrants.[1]

I. The government does not seriously dispute that the decision below deepens a conflict among the federal courts of appeals. The government's attempts to downplay the scope of that divide are insubstantial.

A. The government acknowledges that the Fifth Circuit's decision and those by three other courts of appeals squarely conflict with *United States* v. *Ohayon*, 483 F.3d 1281 (11th Cir. 2007). See Br. in Opp. 17, 20. The government suggests, however, that the Eleventh Circuit might "reconsider" *Ohayon* because the decision below adopted a competing interpretation of a 1979 Fifth Circuit case upon which both *Ohayon* and the opinion below rely. That suggestion is mere wishful thinking.

As noted in our petition (at 17 n.7), the Fifth Circuit read *United States* v. *Larkin*, 605 F.2d 1360

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[1] On October 14, 2008, Hirko entered a plea of guilty pursuant to a plea agreement with the United States. *United States* v. *Hirko*, Crim. No. H-03-93 (S.D. Tex), Dkt. 1536. The plea was entered pursuant to Fed. R. Crim. P. 11(c)(1)(C), which allows the parties to agree upon a specific sentence that "binds the court once the court accepts the plea agreement." If – and only if – the district court accepts the binding plea agreement, Hirko is required to withdraw his Double Jeopardy challenge. The district court, however, will not rule on the plea agreement until well *after* this Court decides whether to grant certiorari in these cases. See Dkt. 1537 (setting sentencing for March 3, 2009). If this Court grants certiorari, the district court's decision on Hirko's plea may be further postponed until this Court has resolved these cases on the merits. Accordingly, counsel for Hirko and counsel for the government have agreed that Hirko's plea does not moot his certiorari petition.

(5th Cir. 1979), to require the consideration of hung counts when evaluating the collateral estoppel effects of an acquittal. Pet App. 23a. *Ohayon*, by contrast, read *Larkin* to compel exactly the opposite conclusion. See 483 F.3d at 1289. The government's suggestion that the Eleventh Circuit "may be willing to re-examine" *Ohayon* now that the Fifth Circuit has offered a competing interpretation of *Larkin* (Br. in Opp. 21) is groundless. The Eleventh Circuit is bound by Fifth Circuit cases decided before October 1, 1981, see *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), but not by Fifth Circuit decisions that *interpret* pre-1981 cases. Indeed, the Eleventh Circuit has specifically held that subsequent Fifth Circuit cases "cannot displace" the Eleventh Circuit's interpretation of pre-1981 cases. *United States* v. *Thomas*, 916 F.2d 647, 651 n.4 (11th Cir. 1990).

B. The government also mistakenly claims that decisions by the Sixth, Seventh, and Ninth Circuits are in mere "tension" – but not actual conflict – with the Fifth Circuit's rule. Contrary to the government's assertions, those decisions do not rest on their "particular facts" (Br. in Opp. 19). Rather, each case squarely holds that the presence of a hung count is legally irrelevant to the collateral estoppel effect of an acquittal. *United States* v. *Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree."); *United States* v. *Bailin*, 977 F.2d 270, 276 (7th Cir. 1992) ("In a retrial of a mistried count in a multicount indictment, does direct estoppel bar the government from relitigating issues that were necessarily and finally decided in the defendant's favor by reason of the jury's partial acquittal on other counts? We hold that it does."); *United States* v.

Frazier, 880 F.2d 878, 883 (6th Cir. 1989) (if a defendant can show that "a verdict of guilty [at the second trial would] be based on evidence that necessarily formed the basis of not guilty findings on other counts at the first trial, * * * then principles of collateral estoppel will preclude a subsequent trial of those counts"). Tellingly, the government does not identify a single case from those jurisdictions that considers a hung count in the collateral estoppel analysis, or that otherwise suggests that those decisions are somehow limited to their "particular facts."

Moreover, the Fifth Circuit admitted that its holding forced it to "part ways with [its] sister circuits." Pet. App. 27a The Eleventh Circuit's decision in *Ohayon* likewise acknowledged the widespread conflict on this question. See 483 F.3d at 1290. Notably, the government simply ignores *Ferrell* v. *State*, 567 A.2d 937, 944 (Md. 1990), which held that the federal Constitution precludes the government from relying on mistried counts to evade the collateral estoppel consequences of an acquittal. See Pet. 19 (citing and quoting same).

The government briefly suggests that review would be "premature" here because the Fifth Circuit "left open the possibility that collateral estoppel may apply in mixed verdict cases." Br. in Opp. 14 n.4. But in the very same footnote, the government effectively *concedes* that "the analysis adopted by the court of appeals will in practice produce the same result as a categorical rule that collateral estoppel never applies in mixed verdict cases." *Ibid.* The fact that the Fifth Circuit mistakenly believes that consideration of hung counts will not categorically preclude application of

Ashe to partial-verdict cases does not diminish the significance or effect of its ruling.[2]

II. The government asserts that review is not warranted because the issue "arises relatively infrequently" and is not outcome-determinative in Hirko's case. Br. in Opp. 21, 22-23. Neither contention has merit.

A. Just last year, the government urged the Eleventh Circuit to grant rehearing *en banc* in *Ohayon*, averring that the issue was one of "exceptional importance." *Ohayon* Reh'g Pet. at i. The government cannot now disavow that assertion simply to defeat review in this case. Moreover, it is hardly fair to say that the issue arises "infrequently" when eight circuits and one state high court have directly addressed the question and two more courts have rejected the argument that collateral estoppel is categorically inapplicable to partial-verdict cases. See *United States* v. *Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979);[3] *United States* v.

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[2] The government does not dispute that this issue is squarely presented in Hirko's case. Indeed, the government expressly agrees "that the [Fifth Circuit's] decision is most reasonably read" to rely on the presence of hung counts to conclude that Hirko is not entitled to the collateral estoppel effects of the jury's acquittals. Br. in Opp. 14-15 n.5. That is hardly surprising, because the alternative reading of the Fifth Circuit's opinion – *i.e.*, that the jury acquitted Hirko of money laundering simply because it "could not decide" whether he committed the predicate offenses (Pet. App. 18a) – is patently erroneous. See Pet. 28-31. Notably, the government does not even address, much less defend, such a holding; in the event this Court were to conclude that the Fifth Circuit intended this alternative reading, summary reversal is warranted.

[3] Contrary to the government's assertion (Br. in Opp. 19 n.7), the essential holding of *Mespoulede* remains valid. See *Bailin*,

Felder, 548 A.2d 57, 66 (D.C. 1988); Pet. 23 (discussing same). And the government appears simply to have overlooked numerous instances in which this issue has arisen in recent years.[4]

In any event, the government ignores the long shadow this rule casts over countless criminal prosecutions. In jurisdictions where the government's failure to prove hung counts is rewarded by eliminating the collateral estoppel effects of an acquittal, prosecutors will have good reason to overcharge their cases in order to maximize that advantage. See Pet. 26-27. The government does not deny that the rule adopted below would give prosecutors just such an incentive. Rather, the

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977 F.2d at 276-277 ("A number of circuits * * * have held that issue preclusion 'bar[s] the Government from relitigating a question of fact that was determined in defendant's favor by a partial verdict.'" (quoting *Mespoulede*, 597 F.2d at 336)). *Dowling* v. *United States*, 493 U.S. 342 (1990), "partially overruled" *Mespoulede* only to the extent the latter "held that issue preclusion applies to *evidentiary* * * * facts." *Bailin*, 977 F.2d at 277 n.9 (emphasis added). Tellingly, the government does not point to a single case within the Second Circuit that questions *Mespoulede*'s repudiation of the argument the government advances here.

[4] See, *e.g.*, *Commonwealth* v. *States*, 938 A.2d 1016 (Pa. 2007); *People* v. *Hodge*, 802 N.Y.S.2d 613 (N.Y. Sup. Ct. 2005); *People* v. *Morales*, 112 Cal. App. 4th 1176 (Cal. Ct. App. 2003); *People* v. *Wharton*, 779 N.E.2d 346 (Ill. App. Ct. 2002); *State* v. *Howell*, No. CR-00-0236-PR (Ariz. Sept. 26, 2000) (unpublished), aff'g No. 1 CA-CR 98-0886 (Ariz. Ct. App. Mar. 2, 2000) (unpublished); *Griffin* v. *State*, 717 N.E.2d 73 (Ind. 1999); *Craigmire* v. *State*, No. 03C01-9710-CR-00440, 1999 WL 508445 (Tenn. Crim. App. July 20, 1999) (unpublished); *Aparo* v. *Super. Ct. for Jud. Dist. of Hartford/New Britain at Hartford*, 129 F.3d 113 (2d Cir. 1997) (unpublished).

government insists that "[t]he Double Jeopardy Clause is * * * not designed to limit the number of charges that prosecutors bring." Br. in Opp. 16. The Double Jeopardy Clause is, however, very much concerned with overcharging when used as a tool to give prosecutors multiple attempts to obtain a conviction. *Ashe*, 397 U.S. at 445-446; Br. *Amici Curiae* NACDL and Criminal Law Professors 19-22.

B. The government also claims that Hirko cannot "show that the jury necessarily found a fact in his favor that is an essential element of the counts on which the jury deadlocked." Br. in Opp. 22. But that argument has no more merit here than it did before the court of appeals, where it was *unsuccessful*. The Fifth Circuit expressly acknowledged that Hirko's sole defense to the 2000 Money Laundering Counts was that he did not commit the predicate offenses. Pet. App. 16a. As the court of appeals observed, Hirko had "stipulated to the other elements" of money laundering, other than the commission of the predicate acts. Pet. App. 17a. Accordingly, the only possible basis for the jury's acquittal on the money laundering counts was that Hirko did not commit any of the predicate offenses upon which the government seeks to retry him.

The government argues that "the indictment and jury instructions could rationally have led the jury to believe that it had to convict Hirko on *all* of the predicate securities, wire fraud, and insider trading counts in order to convict him on the money laundering counts." Br. in Opp. 22. That is precisely the same argument the government advanced – again, *without success* – to the Fifth Circuit.

Indeed, the government subtly (but significantly) mischaracterizes the court of appeals' opinion to suggest that this argument had some traction below. According to the government, the Fifth Circuit

> observed that the jury was instructed that it could find Hirko guilty of money laundering only if the government proved that he engaged in transactions with funds "derived from a specified unlawful activity," and the instructions defined "specified unlawful activity" as "wire fraud" ***and*** "fraud in the sale of securities" (including insider trading).

Br. in Opp. 9 (emphasis added). The government's careful phrasing implies that the Fifth Circuit agreed with the government that the jury was instructed that it could acquit on money laundering only if the government had failed to prove ***all*** of the predicate offenses.

Not so. Here is what the Fifth Circuit actually said: "Under the jury instructions for money laundering, the Government must prove that the funds transacted were 'derived from a specified unlawful activity,' which the district court defined as 'wire fraud' ***or*** 'fraud in the sale of securities.'" Pet. App. 17a (emphasis added). Thus, the Fifth Circuit was unpersuaded by the government's reading of the jury instructions. Indeed, the government simply ignores those instructions that explained to the jury – in no uncertain terms – that the money laundering counts required the government to prove only that Hirko had committed "*some* criminal offense" and that defined "criminally derived property" as "any property constituting or derived from the proceeds of *a* criminal offense." Tr. 13670 (emphasis added); Pet. 6 (quoting same).

III. While the government seeks to preserve the result below, it does not defend the Fifth Circuit's reasoning. Instead, the government renews its argument that *Richardson* v. *United States*, 468 U.S. 317 (1984), and *United States* v. *Powell*, 469 U.S. 57 (1984), require that "the doctrine of collateral estoppel should never bar the government from retrying a defendant on a

count on which a jury was unable to reach a verdict when the same jury acquitted him on another count." Br. in Opp. 12. The government's theory is wrong and only underscores the need for this Court's review.

As we have explained (Pet. 26-27), *Richardson* and *Powell* cannot bear the weight the government's theory requires. *Richardson* held that a jury's failure to reach a verdict on a particular count does not, standing alone, preclude retrial on that count. 468 U.S. at 324-326. The government claims that it "follows" from *Richardson* that there is *never* a double jeopardy bar against retrying mistried counts (Br. in Opp. 12), but *Richardson* did not remotely say that. To the contrary, *Richardson* confirmed that a hung jury is "not an event" for double jeopardy purposes, *id.* at 326; the government's theory would nevertheless allow such a "non-event" to *eliminate* the double jeopardy consequences afforded to a verdict of acquittal. See Pet. 27.

What is more, if the government's contrary reading of *Richardson* were correct, then *Ashe* itself was wrongly decided. In *Ashe*, the defendant was acquitted of robbing one card player and then prosecuted for robbing another player at the same card game. 397 U.S. at 439-440. Jeopardy had not even *attached*, much less *terminated*, with respect to the new charge; this Court nevertheless held that Ashe's prosecution on the new charge violated the Double Jeopardy Clause. *Id.* at 446-447.

The courts of appeals have made exactly this point, noting that the government's interpretation of *Richardson* "'would eliminate collateral estoppel from criminal cases and overrule *Ashe*.'" *United States* v. *Shenberg*, 89 F.3d 1461, 1479 (11th Cir. 1996) (quoting *Bailin*, 977 F.2d at 275)). Indeed, the government has acknowledged elsewhere "that the logical conclusion of its argument renders collateral estoppel superfluous." *Bailin*, 977 F.2d at 275 n.6 (citing government's reply

brief). *Richardson* cannot fairly be read to mandate that remarkable result, which is perhaps why the government's theory has been repudiated by the Sixth, Seventh, Ninth, and Eleventh Circuits, and adopted nowhere. See *Wilson* v. *Czerniak*, 355 F.3d 1151, 1156 (9th Cir. 2004); *Shenberg*, 89 F.3d at 1479; *Bailin*, 977 F.2d at 275; *United States* v. *Benton*, 852 F.2d 1456, 1462 (6th Cir. 1988).

Likewise, *Powell* held only that inconsistent *verdicts* of acquittal and conviction do not entitle a defendant to relief. 469 U.S. at 65. *Powell* did not address the question whether the double jeopardy protections that arise from a *verdict* of acquittal are trumped by a *non-verdict* on another count. Indeed, *Powell* rests on the fundamental respect courts owe to unanimous decisions reached by a jury; it would be odd to think that the collateral estoppel consequences afforded to such a decision could be set aside based solely on the jury's *failure* to decide another, factually overlapping count.

To say the very least, the government's position would require a significant extension of *Richardson* and *Powell*. This Court – not the government or a minority of courts of appeals – ought to decide whether to extend those cases to the circumstances presented here. And to the extent the government's reading of *Richardson* would implicitly overrule *Ashe*, such a sweeping decision ought to come, if at all, only after this Court's plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented. Alternatively, the Court should summarily reverse the Fifth Circuit's judgment or grant certiorari on the second question presented.

Respectfully submitted.

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Nos. 08-40, 08-58, 08-67

In the Supreme Court of the United States

JOSEPH HIRKO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

F. SCOTT YEAGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REX SHELBY

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit organization with direct national membership of more than 12,500 attorneys and more than 35,000 affiliate members from all 50 States. NACDL is the only national professional bar association that represents public defenders, private criminal defense lawyers, and law professors. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL routinely files *amicus curiae* briefs in this Court and other courts throughout the country.

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[1] In accordance with Supreme Court Rules 37.2 and 37.6, counsel for *amici* represent as follows: None of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. This brief was authored in its entirety by counsel for *amici*. The parties received timely notice of *amici*'s intent to file this brief and gave their consent. Letters of consent have been filed with the Clerk.

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SUMMARY OF ARGUMENT

The doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy" and applies fully in criminal cases. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). The doctrine acts to prevent the government from prosecuting a defendant for a crime that requires proof of a fact that was "actually and necessarily decided in the defendant's favor" by an earlier jury's verdict of acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). In its decision below, the Fifth Circuit, "part[ing] ways with [its] sister circuits," wrongly held that a jury's failure to return a verdict on one count of a multi-count indictment can be "weighed" against the jury's judgment of acquittal on a factually overlapping charge in a way that fatally undermines the collateral-estoppel consequences of that acquittal. App. 27a. The Fifth Circuit's decision aggravates an already deep and entrenched circuit split on the "weighing" issue—and, significantly, creates a rule that effectively abolishes the collateral-estoppel doctrine in increasingly common multi-count prosecutions that result in partial verdicts.

Collateral estoppel is an essential component of the Double Jeopardy Clause and is firmly rooted in the Clause's history and tradition. The doctrine works hand-in-hand with the Clause both to protect final judgments and to prevent successive prosecutions. The Fifth Circuit's decision is in the teeth of these two core constitutional policies.

First, by "weighing" mistried counts in the collateral-estoppel calculus, the decision will invariably lead to the unconstitutional disregard of juries' final judgments

of acquittal, thus destroying the "special weight" that acquittals have historically been given in the double-jeopardy analysis. That is because "weighing" a jury's failure to reach a decision on a factually overlapping charge—a failure that means absolutely nothing for double-jeopardy purposes—will by definition create uncertainty that will prevent a defendant from carrying his burden of proving that an issue of ultimate fact was *actually and necessarily* decided in his favor by his earlier acquittal. Indeed, the Fifth Circuit's decision itself makes this point. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—*after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. But to reach this decision, the court had to disregard Yeager's acquittals, which themselves indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.* The Fifth Circuit's "weighing," therefore, is tantamount to a *per se* no-estoppel rule.

Second, the Fifth Circuit's decision creates a gaping hole in the Double Jeopardy Clause's protections against successive prosecutions. By allowing a jury's failure to reach a verdict on one count to trump an acquittal in a partial-verdict case, the decision perversely incentivizes the government to charge as many overlapping counts as possible—and to do so precisely so that it can avoid the collateral-estoppel consequences of that acquittal. That is because, under the Fifth Circuit's approach, when a jury acquits a defendant on some counts but hangs on another with a related element, the government is free to retool its case against the defendant on the mistried count in a future prosecution even where the acquittals,

when "consider[ed] ... by themselves," would estop the prosecution of the mistried count. App. 22a. The Fifth Circuit's decision thus rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. That result turns the Double Jeopardy Clause on its head.

ARGUMENT

These cases present a question of vital importance to the criminal justice system: Whether, consistent with the Double Jeopardy Clause, a jury's failure to reach a decision on one count of a multi-count indictment (here, the "hung" or "mistried" count) can be "weighed" against an acquittal on a factually related count in a manner that diminishes the acquittal's collateral-estoppel effect for future prosecutions. The petitioners have already detailed the deep and entrenched circuit split that exists on that question. *See* Hirko Pet. 16-24; Yeager Pet. 12-22; Shelby Pet. 9-16. Briefly, the First, Fifth, and D.C. Circuits have held that weighing mistried counts against acquitted counts is permissible under the Double Jeopardy Clause; the Sixth, Seventh, Ninth, and Eleventh Circuits have held that such weighing violates that Clause's collateral-estoppel component. And, indeed, in the decision below, the Fifth Circuit candidly acknowledged that by "weigh[ing] hung counts in applying collateral estoppel" it was "part[ing] ways with [its] sister circuits." App. 22a, 27a. The existence of the split, therefore—which is reason enough to grant certiorari—is well-established, and there is no point in replowing that ground here.

This brief seeks, instead, to emphasize two additional points: first, that the doctrine of collateral estoppel

has historically played, and continues to play, an important role in promoting the fundamental purposes of the Double Jeopardy Clause; and second, that the Fifth Circuit's rationale in this case would eviscerate the collateral-estoppel doctrine as it applies to an increasingly large swath of criminal cases, particularly in this age of overlapping federal offenses that provide multiple means of imposing criminal liability for the same underlying conduct.

I. The Collateral-Estoppel Doctrine Is Part and Parcel Of The Double Jeopardy Clause.

A. *Ashe v. Swenson* Established The Applicability Of Collateral Estoppel As A Rule Of Constitutional Criminal Procedure.

The doctrine of collateral estoppel operates as "an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). Collateral-estoppel issues arise most often, of course, in civil litigation between private parties. Importantly, however, this Court in *Ashe* recognized that collateral-estoppel principles are "embodied in the Fifth Amendment guarantee against double jeopardy" and apply with full force in criminal cases. *Id.* at 445.

As a rule of constitutional criminal procedure, collateral estoppel operates to prevent the government from prosecuting a defendant for a crime that requires proof

of a fact previously decided in the defendant's favor by an earlier jury's verdict of acquittal. The critical question that controls the doctrine's application is whether the particular fact was indeed "actually and necessarily decided" for the defendant as part of the earlier acquittal. *Schiro v. Farley*, 510 U.S. 222, 236 (1994). If it was, then the government is barred—collaterally estopped—by the Double Jeopardy Clause from re-prosecuting.

Collateral-estoppel doctrine, this Court said in *Ashe*, "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe*, 397 U.S. at 444. A court's review, in other words, "'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (internal citation omitted). In particular, in deciding for "constitutional collateral estoppel" purposes whether a fact was "actually and necessarily decided" in the defendant's favor, *Schiro*, 510 U.S. at 232, 236, "a court [must] 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ashe*, 397 U.S. at 444 (internal citation omitted). The point of the pragmatism is clear: "Any test more technically restrictive would ... simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." *Id.*

By preventing the relitigation of a controlling fact once it has necessarily been determined, *Ashe* plays a crucial role in ensuring the core protections of the Dou-

ble Jeopardy Clause. But, to be clear, *Ashe* hardly gives criminal defendants a free pass. Under *Ashe*, it is the acquitted defendant—not the government—who bears the burden of proof. In particular, in order to invoke collateral estoppel to prevent successive prosecution on a factually overlapping charge, the defendant must demonstrate that a fact necessary to the government's case was "actually and necessarily decided" in his favor as part of his earlier acquittal. *Schiro*, 510 U.S. at 236; *accord Dowling v. United States*, 493 U.S. 342, 350-51 (1990) (same). *Ashe*, therefore, erects a high bar, which significantly limits collateral estoppel's real-world operation. *See Dowling*, 493 U.S. at 358 (Brennan, J., dissenting).

Petitioners Hirko, Yeager, and Shelby would seem to fall squarely within the narrow-but-essential protection of *Ashe*: Each defendant staked his case on one controlling issue, and each defendant's acquittal indicates that the jury must have "actually and necessarily decided" that issue in the defendant's favor. Hirko's case is illustrative. Hirko was charged (as relevant here) with securities fraud, wire fraud, and money laundering stemming from those underlying frauds. Hirko contested but a single element of the Government's money-laundering charge and "stipulated to the other elements." App. 16a-17a. Hirko's targeted defense: that his conduct did not involve "criminally derived" funds, 18 U.S.C. § 1957, because he did not commit the acts of wire and securities fraud on which the money-laundering charges were predicated. App. 16a-17a. In acquitting Hirko of money laundering, the jury *must* have decided that he did not commit the underlying frauds. Those frauds, therefore, cannot be relitigated in any future prosecution. *See Dowling*, 493 U.S. at 350; *Ashe*, 397

U.S. at 443.[3] The same basic analysis applies to Yeager (Pet. 4-6) and Shelby (Pet. 5-8). Under a straightforward application of controlling precedent, then, the Government's attempt here to institute new charges that require, in part, a different determination by a second jury of facts previously established in the petitioners' favor should be barred.

The Fifth Circuit reached a contrary conclusion based on logic that, if credited, would eviscerate the collateral-estoppel doctrine—and *Ashe*—in a whole host of multi-count prosecutions. In performing its *Ashe* analysis, rather than focusing on the jury's actual decisions—the acquittals—the Fifth Circuit gave controlling weight to the jury's *failure to reach a decision* on factually related counts charged in the petitioners' first trial. In doing so, the Fifth Circuit exacerbated an already deep and entrenched circuit split—and, far worse, created what amounts to a partial-verdict loophole in the collateral-estoppel doctrine, a loophole that, as we explain in Part II, undermines the very principles that the Double Jeopardy Clause was designed to protect.

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[3] Hirko is clearly correct that the only reasonable reading of the Fifth Circuit's opinion (as it relates to him) is that the court treated the jury's failure to reach a decision on the predicate frauds as reason to disregard the clear import of Hirko's money-laundering acquittals. *See* Hirko Pet. 28. If the Fifth Circuit intended the literal meaning of what it said, at least in part—that the jury "had to acquit" Hirko on the money laundering counts "[s]ince it could not determine whether Hirko committed" the predicate frauds (App. 18a)—then its decision is so manifestly wrong as to warrant summary reversal. It is hard to imagine a principle more basic than that a jury that *cannot decide* whether a criminal defendant committed a charged act must hang, not acquit. Indecision leads to a mistrial, not an exoneration. *See, e.g.*, *United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006); Fed. R. Crim. P. 31(b)(3).

B. The Collateral-Estoppel Doctrine Is Firmly Rooted In The Double Jeopardy Clause's History And Tradition.

The Double Jeopardy Clause states that no person "shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Clause has deep roots in British common law and, in particular, in the common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon. As Blackstone noted, "the plea of *autrefois acquit*, or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." 4 William Blackstone, *Commentaries* 335, *quoted in Green v. United States*, 355 U.S. 184, 187 (1957).

The Clause's history demonstrates that a primary purpose of double-jeopardy protection at common law was to prevent multiple prosecutions arising out of the same conduct. Concerns about successive prosecutions, in turn, arose from the twin beliefs that final factual determinations should be respected and that prosecutors should not get multiple opportunities to convict. *See* Anne B. Poulin, *The Limits of Double Jeopardy: A Course Into The Dark?* 39 Vill. L. Rev. 627, 639 (1994) ("The original purpose of double jeopardy protection and its predecessors was to preserve the finality of judgments."); *id.* at 633-34 ("Double jeopardy protects the defendant's interest in freedom from multiple trials and multiple punishments ...."). As we explain below, the Fifth Circuit's decision here violates not one but both of these common-law commitments.

The collateral-estoppel doctrine, as applied in criminal cases, shares the same basic pedigree. It is closely linked to the history and traditions that underlie the Double Jeopardy Clause itself. Writing for the Court nearly a century ago, Justice Holmes emphasized that connection in *United States v. Oppenheimer*: "[T]he 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice in order, when a man once has been acquitted on the merits, to enable to government to prosecute him a second time." 242 U.S. 85, 88 (1916) (internal citation omitted). Some years later, in *Ashe*, this Court made even more explicit the historical relationship between the Double Jeopardy Clause and collateral estoppel. *See* 397 U.S. at 446 n.10. (explaining how collateral estoppel "became a safeguard firmly embedded in federal law"); *see also* Anne B. Poulin, *Collateral Estoppel in Criminal Cases: Reuse of Evidence After Acquittal*, 58 U. Cin. L. Rev. 1, 12 (1989) ("If the first proceeding ends in acquittal, of course, collateral estoppel comes into play as well as basic double jeopardy protection.").

The linkage should come as no surprise. It fits hand-in-glove with the rise of the modern criminal code. Protections against double jeopardy developed at a time when crimes were creatures of the court-crafted common law and when legislatures played virtually no role in their definition. *See* Anne B. Poulin, *Double Jeopardy Protection from Successive Prosecutions: A Proposed Approach*, 92 Geo. L.J. 1183, 1200 (2004). In those days, there were far fewer crimes, and courts defined the elements of those crimes very clearly and very simply. As this Court has explained that era, "at common law, and under early federal criminal statutes, offense categories were relatively few and distinct." *Ashe*, 397 U.S. at 446

n.10. Accordingly, as an historical matter, *autrefois acquit* provided sufficient protection to the accused because "[a] single course of criminal conduct was likely to yield but a single offense." *Id.*

The evolution of complex criminal codes, however, brought about a sea change. As legislatures began establishing crimes and assigning elements, they often used detailed, technical language that was not always consistent from one provision to another. *See* Poulin, *supra*, 92 Geo. L.J. at 1200. Not surprisingly, "[a]s the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced." *Ashe*, 397 U.S. at 446 n.10. That was because "with the advent of specificity in draftsmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction." *Id.*

It was as a result of this dramatic shift—from the relative simplicity of the common law to the complexity of the modern code—that "federal courts soon recognized the need to prevent such abuses through the doctrine of collateral estoppel, and it became a safeguard firmly embedded in federal law." *Id.* Meticulously tracing the history, and echoing Justice Holmes' opinion in *Oppenheimer*, this Court in *Ashe* reiterated that the principles of fundamental fairness (and systemic efficiency) that underlie civil collateral estoppel must apply with equal force in the criminal context—and, more particularly, that those principles are part and parcel of the Double Jeopardy Clause. *See id.* at 445.

II. The Fifth Circuit's Decision Eviscerates The Collateral-Estoppel Doctrine In Multi-Count Prosecutions That Result In Partial Verdicts.

Double-jeopardy protections against multiple prosecutions address two fundamental concerns in our legal system. First, the Double Jeopardy Clause is specifically designed to safeguard final judgments. *See, e.g.*, *United States v. Scott*, 437 U.S. 82, 92 (1978) ("[T]he primary purpose of the Double Jeopardy Clause was to protect the integrity of a final judgment."). Second, and relatedly, the Clause ensures that an acquitted defendant is not subjected to a do-over in which the prosecutor hopes to refine his case or strike a more favorable jury. *See, e.g.*, *Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("'[T]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.'" (quoting *Burks v. United States*, 437 U.S. 1, 11 (1978)). Collateral estoppel, as applied by this Court in *Ashe*, addresses the very same two concerns. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978) ("A primary purpose" served by the Double Jeopardy Clause is "akin to that served by the doctrines of res judicata and collateral estoppel—to preserve the finality of judgments."); *Ashe*, 397 U.S. at 446 (Collateral estoppel "protects a man who has been acquitted from having to 'run the gantlet' a second time.") (internal citation omitted).

The Fifth Circuit's decision below ignores—and worse, actually undermines—both of these double-jeopardy/collateral-estoppel principles. First, by "weighing" mistried counts in the collateral-estoppel analysis, the decision eliminates the special significance that has traditionally been accorded acquittals. And second, by

allowing a mistried count to trump an acquittal in a partial-verdict scenario, the decision incentivizes prosecutors to overcharge criminal defendants as a means of paving the way for a retrial in the event that the jury acquits on some counts but hangs on others.

A. The Fifth Circuit's Decision Undermines The Integrity Of Final Judgments And The Special Significance Given To Acquittals.

This Court's double-jeopardy decisions make one principle absolutely clear: An acquittal is a constitutionally significant event that is "accorded special weight" in the Fifth Amendment analysis. *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980); *Tibbs*, 457 U.S. at 41 (same); *accord Poland v. Arizona*, 476 U.S. 147, 156 (1986) ("'[T]he law attaches particular significance to an acquittal.'" (quoting *Scott*, 437 U.S. at 91 (1978)). "'The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,' for the 'public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though 'the acquittal was based upon an egregiously erroneous foundation.'" *DiFrancesco*, 449 U.S. at 129 (quoting *Fong Foo v. United States*, 369 U.S. 141, 143 (1962)). Put slightly differently, "[i]f the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair." *Arizona v. Washington*, 434 U.S. 497, 503 (1978).

The Fifth Circuit's decision ignores altogether—and, as we will show, flips on its head—the "special weight" given to acquittals. In its *Ashe* analysis, the Fifth Circuit "part[ed] ways with [its] sister circuits" and concluded

that it was bound to "weigh hung counts" in assessing the collateral-estoppel effect of an acquittal. App. 22a, 27a. It did so even though it is well established that a hung, or mistried, count means *precisely nothing* for double-jeopardy purposes. Unlike an acquittal, which says something specific and concrete—namely, that the jury has unanimously concluded that the defendant is not guilty of the charged offense—a mistrial is a constitutional non-event. *See Richardson v. United States*, 468 U.S. 317, 325 (1984) (noting that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy" and that "the failure of the jury to reach a verdict is not an event which terminates jeopardy").

The Fifth Circuit's analysis wrongly "presumes that a mistried count, like an acquitted count, is a decision for which we can discern, or to which we can impute, a single basis." *United States v. Ohayon*, 483 F.3d 1281, 1289 (11th Cir. 2007) (Pryor, J.). It is not. "[T]he failure of a jury to reach a verdict is not a decision; it is a failure to reach a decision." *Id.* Partial verdicts cannot be reconciled for the simple reason that "the mistried count is not a decision for which we can discern, or to which we can impute, a single, rational basis. The very essence of a mistried count is that the jury failed to reach agreement." *Id.*; *see also United States v. Romeo*, 114 F.3d 141, 144 (9th Cir. 1997) ("Because there are so many variable factors which can cause a jury not to reach a verdict, we will not speculate on why the jury could not agree. The inquiry under *Ashe* is what the jury actually decided when it reached its verdict, not ... why the jury could not agree on the deadlocked count.").

Because a mistried count is a double-jeopardy non-event, it cannot be "weighed" or otherwise used to devalue, let alone trump, a jury's final, and conclusive, judgment of acquittal. The Fifth Circuit's contrary conclusion cannot be reconciled with the acknowledged purpose of the Double Jeopardy Clause—and its component collateral-estoppel doctrine—to safeguard acquittals.

The wrongheadedness of the Fifth Circuit's approach is magnified once it is realized that the practice of "weighing" mistried counts against an acquittal to determine the acquittal's collateral-estoppel effect will, in actuality, result in a *per se* no-estoppel rule for partial verdicts. The reason lies in the stringent showing that an acquitted defendant must make in order to avail himself of the collateral-estoppel doctrine—namely, that an issue of ultimate fact was *actually and necessarily decided* in his favor in the course of the earlier acquittal. If a mistried count on a charge with a factually overlapping element can be considered, or "weighed," in the collateral-estoppel calculus, then it will, by definition, create uncertainty regarding the jury's verdict of acquittal, thereby preventing the acquitted defendant from establishing what the jury necessarily decided when it acquitted him. *See Ohayon*, 483 F.3d at 1289 (recognizing that "the search for the basis of a mistried count will necessarily be in vain"). Accordingly, *every* time a hung count is considered in determining the collateral-estoppel consequences of a defendant's acquittal of a crime that shares one or more factually related elements, the hung count will act to preclude the defendant from getting the benefit of his acquittal.

That problem is exacerbated because a defendant has no practical way of peeking behind the jury's verdict

to determine, in actuality, why the jury acquitted him on one count while failing to reach a decision on another factually related count. A defendant typically cannot obtain and admit evidence concerning the jury's deliberations in order to establish why the jury hung or to discern what the jurors' failure to decide may or may not mean. *See* Fed. R. Evid. 606(b). Indeed, "[c]ourts have always resisted inquiring into a jury's thought processes" on the ground that "this deference to the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." *United States v. Powell*, 469 U.S. 57, 67 (1984). Without the practical ability to discover and use evidence necessary to understand definitively a jury's decision to acquit on one charge and to hang on another, a defendant's already-difficult burden under *Ashe* becomes insurmountable.

The Fifth Circuit's decision itself actually makes our point that "weighing" mistried counts will invariably lead to the unconstitutional disregard of a defendant's acquittal. Consider Yeager's case. In rejecting Yeager's assertion that collateral estoppel barred his retrial, the court unsurprisingly found—only *after* "consider[ing] the hung counts along with the acquittals"—"a potential inconsistency, making it impossible for [it] to decide with any certainty what the jury necessarily determined." App. 22a. To reach this decision, however, the court had to disregard the acknowledged fact that Yeager's acquittals, when "consider[ed] ... by themselves," indicated "that Yeager is correct that collateral estoppel bars a retrial." *Id.*

The Fifth Circuit's decision is thus squarely at odds with the Double Jeopardy Clause's core purpose of pro-

tecting final judgments. This Court should grant certiorari to make clear, as the majority of the courts to consider the question have held, that mistried counts are irrelevant to the application of collateral estoppel in criminal cases. Absent this Court's intervention, the Fifth Circuit (along with the First and D.C. Circuits) will continue to rely on mistried counts—double jeopardy non-events—to undermine conclusive judgments of acquittal and their "special weight" under the Double Jeopardy Clause. *DiFrancesco*, 449 U.S. at 129; *Tibbs*, 457 U.S. at 41 (same); *accord Poland*, 476 U.S. at 156 ("'particular significance'" (quoting *Scott*, 437 U.S. at 91)).

B. The Fifth Circuit's Decision Will Encourage Overcharging And Facilitate Successive Prosecutions.

The Fifth Circuit's decision simultaneously undermines the Double Jeopardy Clause's second core function—the protection against successive prosecutions. The decision all but ensures that criminal defendants will increasingly face compound, multi-count indictments and (what is worse) exposes them to the very real possibility of successive prosecutions for factually related crimes arising out of the same underlying conduct. By creating a rule in which a simultaneously charged hung count can trump a factually related acquitted count—thereby paving the way for a retrial—the Fifth Circuit's decision perversely incentivizes prosecutors to charge as many overlapping counts as possible. The reason is simple: Overcharging gives the government the best chance of evading the collateral-estoppel consequences of—in effect, insuring against—an acquittal. Where, as here, a jury acquits a defendant on one count but for some un-

known—and unknowable—reason hangs on a count with a related element, the government is free, under the Fifth Circuit's rationale, to wipe the slate clean, retry the mistried count, and, for that matter, bring any other charge that otherwise would have been barred by *Ashe*. And *why not* "lard[] the indictment with multiple offenses based on the same conduct"? Hirko Pet. 26. There is, from a prosecutor's strategic perspective, absolutely nothing to lose and absolutely everything to gain.

Think, again, about Hirko's case. It is undisputed that Hirko contested only one element of the money-laundering charges brought against him: He denied committing the underlying acts of wire and securities fraud that the Government relied on to show that his conduct involved "criminally derived" funds under the money-laundering statute. App. 16a. Hirko, of course, was acquitted on the money-laundering counts. The only rational way to understand the acquittals is as resting on a factual finding that Hirko did not commit the underlying frauds. In other words, "consider[ing] the acquittals by themselves" (App. 22a) shows that the jury unanimously concluded that the Government failed to prove that Hirko committed the predicate frauds.

It is therefore common ground that if Hirko had been charged in this case with money laundering *only*, the Double Jeopardy Clause (by way of collateral estoppel) would preclude the Government from later trying Hirko for the predicate frauds. *See Powell*, 469 U.S. at 64. But under the Fifth Circuit's rationale, everything changes—and the collateral-estoppel bar vanishes—simply because the Government charged the predicate frauds alongside money laundering and because, for whatever reason, the jury hung on the fraud counts. The

inequity of that situation is patent, and the incentives it creates are perverse.

Jettisoning collateral estoppel in partial-verdict cases, as the Fifth Circuit has done, creates a gaping hole in the fundamental constitutional protections against successive prosecutions. *See Schiro*, 510 U.S. at 230. Because the Fifth Circuit's rule allows "a second jury to reconsider the very issue upon which the defendant has prevailed," it "implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause." *United States v. Mespoulede*, 597 F.2d 329, 337 (2d Cir. 1979). Casting aside this core protective function of the Clause, the Fifth Circuit has created a system with little to "prevent[] the State from honing its trial strategies and perfecting its evidence through successive attempts at conviction." *Tibbs*, 457 U.S. at 41. This greatly increases the risk of "[r]epeated prosecutorial sallies [that] unfairly burden the defendant and create a risk of conviction through sheer governmental perseverance." *Id.*

The practical threat posed by the Fifth Circuit's decision is very real. Legislatures are creating new—and often complex—criminal offenses every day. The federal criminal law, in particular, continues to experience explosive growth. *See* John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation Legal Memorandum 26 (June 16, 2008), *available at* www.heritage.org/research/legalissues/lm26.cfm (cataloguing approximately 4,450 federal crimes and noting that Congress continues to adopt new crimes at a rate of about 57 per year). This continuing proliferation of

criminal statutes permits prosecutors to charge numerous overlapping offenses to cover a single course of criminal conduct. *See, e.g.*, *United States v. Bailin*, 977 F.2d 270, 277 (7th Cir. 1992) ("Prosecutors have the discretion to charge a defendant who is accused of a rather limited criminal act with numerous separate crimes. But because the technical elements necessary to establish these different crimes often differ, the defendant who is acquitted on only some counts may receive no formal double jeopardy protection."). Prosecutors therefore clearly have the *opportunity* to skirt double-jeopardy protections by filing bloated multi-count indictments. And the Fifth Circuit's stingy view of collateral estoppel gives prosecutors the *incentive* to do just that. It leads to precisely the sort of agglomeration of prosecutorial power that led this Court in *Ashe* to reiterate the centrality of collateral estoppel to double-jeopardy doctrine. *See Ashe*, 397 U.S. at 446 n.10.

The Fifth Circuit's decision in this case discards core protections for acquitted defendants in exchange for a system that rewards prosecutors for overcharging their cases and then failing to prove the superfluous charges. This Court should step in to ensure that double-jeopardy principles are not so easily evaded.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for certiorari.

Respectfully submitted,

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